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Reflections on the Constitutional Issues in South Africa :

Part II

THE SOVEREIGNTY OF PARLIAMENT

In the first part of this article [1] I explained the reasons given by the South African Appeal Court in the *Vote Case* [2] for holding that the Statute of Westminster did not impair the legal force of the entrenched sections of the South Africa Act. It will be recalled [3] that counsel for the Government put forward a number of propositions about the British Parliament and its relationship with the courts, which he claimed were directly relevant to the issues in South Africa. He contended that these propositions were implicit in a true view of legislative sovereignty, and that unless they were applied in the Government's favour, it would follow that the Union Parliament was not sovereign.

The court was not to be drawn into deciding the concrete case before it by deduction from any preconceived theory of sovereignty. And as their Lordships were satisfied that the Union Parliament had been cast in a different mould from that of the Parliament of the United Kingdom,[4] they did not consider it relevant to examine the position in Britain. But when this has been said, it must be acknowledged that the Government's contentions raised questions of intrinsic importance which merit discussion.[5]

[1] 15 M.L.R., July, 1952, pp. 282 *et seq.*

[2] *Harris and Others* v. *Minister of the Interior*, 1952(2) S.A. 428; [1952] 1 T.L.R. 1245. The later decision of the Appellate Division, declaring void the High Court of Parliament Act, is reported *sub nom. Minister of the Interior* v. *Harris and Others*, 1952 (4) S.A. 769. To avoid confusion between these cases, it is convenient to call the first the *Vote Case*, and the second the *High Court Case*.

[3] 15 M.L.R., at pp. 282–3.

[4] 15 M.L.R., pp. 286–7. For fuller discussion, see my essay on *Parliamentary Sovereignty and the Entrenched Sections of the South Africa Act*, Juta, 1951, pp. 4–8.

[5] Some of the topics outlined in this article will be more fully discussed by the author in a book now in preparation.

The Jurisdiction of the Courts

We have seen that the South Africa Act contains rules of law prescribing the manner in which the constituent elements of Parliament must function for the purpose of passing legislation, and that the entrenched sections are part of those rules.[6] It was contended, however, in the *Vote Case* that the courts have no jurisdiction to inquire whether the entrenched sections have been duly observed, and that any other view is incompatible with the sovereignty of the Union Parliament.

Five arguments have been adduced in support of this contention,[7] but, as I shall endeavour to show, none of them substantiates it.

(i) *Conclusiveness of the Parliament Roll*

Counsel for the Government claimed that if English legal principles were applied—as he contended they should be—the voters' application would necessarily fail, because, in Dicey's words, English law does not recognise any judicial or other authority as having the right to treat an Act of Parliament as void or unconstitutional.[8] It is submitted, however, that English law is by no means as favourable to the Government's case as was claimed. To say that an English court cannot treat an Act of Parliament as void is undoubtedly true, but does not end the matter; for it leaves unanswered the question "What is an Act of Parliament?"

The time is, of course, past when English lawyers might argue that an Act of Parliament is void as being contrary to immutable principles of natural or common law.[9] Today, as Lord Shaw of Dunfermline has stated,[10] it is the merest platitude that "under the British Constitution it is never open to judges or to any other authority to challenge the validity of legislation by the Imperial Parliament as an excess of power."

It is, however, one thing to withhold from the courts jurisdiction to disregard an Act of Parliament as an excess of power,

[6] 15 M.L.R., p. 287.

[7] Not all of these were relied on by Counsel for the Government. For completeness, I have also taken account of the arguments put forward by Professor E. C. S. Wade in his opinion on the entrenched sections, the *Cape Times*, March 24, 1952.

[8] This is specifically stated by Dicey to be an "essential feature of a Sovereign Parliament like that of England": *Law of the Constitution*, 9th ed., pp. 40, 91.

[9] According to Maitland (*Collected Papers*, Vol. 2, p. 481), the idea of fundamental and immutable law was never much more than "a speculative dogma" in England. Holdsworth's views are substantially similar. They are summarised in his *Essays in Law and History*, pp. 59, 66, 67, 81. For the contrary view, see Professor C. H. McIlwain's *High Court of Parliament*, *passim*, and his collection of essays entitled *Constitutionalism and the Changing World*, 1939, particularly Essays, IV, VI and IX. For further comment, see S. B. Chrimes, *English Constitutional Ideas of the Fifteenth Century*, Cambridge, pp. 201, 284, 290–1, and Plucknett, *Statutes and their Interpretation in the Fourteenth Century*, pp. 26–9, and, on the subject generally, G. L. Mosse's *The Struggle for Sovereignty in England*, 1950.

[10] *Legislature and Judiciary*, University of London Press, 1911, p. 27. Lord Shaw's book suggested the title of this article.

quite another to deny them jurisdiction to inquire whether a document, alleged to be an Act of Parliament, is an authentic expression of Parliament's will. And English law, it is submitted, makes no such denial. On the contrary, the cases show that the question is not *whether* the courts may inquire into the authenticity of alleged Acts of Parliament, but rather *the extent* to which they may do so.[11] What is the effect of the Royal Assent, of the enacting clause, and of the fact of enrolment? To what extent does the Royal Assent cure irregularities in the passing of a statute? Is enrolment conclusive of authenticity? These have been—and still are—the critical questions, and they are surprisingly difficult to answer with any assurance.

It was argued in the *Vote Case* that the question "What is an Act of Parliament?" presents no real difficulty in English law because the Parliament Roll is conclusive. And reference was made to the well-known words of Lord Campbell in *Edinburgh and Dalkeith Railway Co.* v. *Wauchope* [12]:

> "All that a court of justice can do is to look to the Parliamentary roll: if from that it should appear that a Bill has passed both Houses and received the Royal Assent, no court of justice can inquire into the mode in which it was introduced into Parliament, nor into what was done previous to its introduction, or what passed in Parliament during its progress in its various stages through both Houses."

It is worth pausing, however, to give some thought to the alleged conclusiveness of the Parliament Roll [13] in English law. There are cases on record where Bills containing amendments made by one House have accidentally received the Royal Assent before the amendments were agreed to by the other House. Where such irregularities have been discovered, the British Parliament has generally thought it necessary, or at least advisable, to pass validating legislation. For example, a defect of this kind was rectified in 1843 by an Act significantly entitled "An Act to render valid an Act for. . . ." [14]

[11] Craies, *Statute Law*, 4th ed., p. 35 (citing *The Prince's Case*, 8 Coke 20 b.; 77 E.R. 481), states the position correctly when he says: "The judges have to some extent power to inquire whether a statute is what it purports to be—an Act of Parliament." See also Sheldon Amos, *Fifty years of the English Constitution*, 1830–1880, p. 16, note 1. *Cf. Swaffer* v. *Mulcahy* [1934] 1 K.B. 608, at pp. 627–8.

Dr. Julius Hatschek, *Englisches Staatsrecht*, Tubingen, 1905, Vol. 1, p. 139, compares the position in England with the so-called 'formal testing right' of Continental jurisprudence: *Also in formal juristischer Hinsicht ist die Stellung der englischen Richter nur unbedeutend verschieden von der des kontinentalen Richters, dem auch nur ein sog. formelles Prüfungsrecht des Gesetzes zusteht—richtiger ein Prüfungsrecht der formalen Kriterien des Gesetzes.* Hatschek's work deserves rather more attention than it has yet received in England.

[12] (1842) 8 Cl. & F. 710, at 724–5.

[13] Since 1849 it has been the practice to file original vellum prints or "rolls" in the House of Lords.

[14] 6 & 7 Vict. c. lxxxvi (1843). For other examples, see 1 & 2 Geo. 4, c. xcv, and 7 Vict. c. xix. There are helpful discussions in Craies *Statute Law*, 4th ed., p. 35, Erskine May, *Parliamentary Practice*, 14th ed., pp. 564–7, and in the Report of the Select Committee on 6 & 7 Vict. c. lxxxvi (1843), No. 413 of 1843.

But what if a defect of this kind should escape notice and the validity of the measure were questioned in a court of law?

Such a case, that of Sir John Pylkington, was brought before the Exchequer Chamber in 1454–55.[15] By a special "Act of Parliament" passed in the spring of 1450,[16] John Pylkington was required to appear on a charge of rape. He refused to do so, and challenged the validity of the "Act." His counsel pointed out that the Bill, as it passed the Commons, required "that the said John surrender himself before the feast of Pentecost next ensuing," whereas as it passed the Lords, he was to appear "before the feast of Pentecost which shall be in 1451." It was argued that "because the Lords granted a longer day than was granted by the Commons, in which case the Commons ought to have the Bill returned to them and assent to the grant of the Lords but it was not so; wherefore the Act seems void."

The court heard evidence from Fauxes, the clerk of Parliament, who explained how the discrepancy arose. According to his account, the Bill was introduced in the Commons after the feast of the Pentecost in 1450 with the intention that Pylkington should appear in 1451, but because at that time every Act was dated as of the first day of the Session (which was before the feast of the Pentecost), the Lords inserted 1451 to make the Bill conform to its true intent.

After hearing argument, the judges sought the opinion of Kirkby, the Master of the Rolls, who thought that the Act was void, and a majority of the court (Illingsworth C.B. and Markham J.) shared this view.[17] Fortesque C.J. was more cautious. He apparently thought that the Act was valid because it had been certified by the King's Writ to have been confirmed by the authority of Parliament.[18] "This," he said, "is an Act of Parliament and we wish to be well advised before we annul any Act made in Parliament and peradventure the matter should wait until the next Parliament, until we can be certified by them of the certainty of the matter." Unlike his brethren, he would not say

[15] Year Book, 33 Hen. VI, fo. 17, p. 8. The court consisted of Fortesque C.J., Illingsworth C.B. and Markham J. An English translation of the Year Book record is to be found in the Report of the Select Committee of the House of Commons, No. 413 of 1843. See also *The Fane Fragment of the 1461 Lords' Journal*, ed. Dunham, Appendix D; S. B. Chrimes, *English Constitutional Ideas in the Fifteenth Century*, pp. 231 *et seq.*; J. C. Wedgwood's *History of Parliament, s.v. Pylkington*, pp. 684–5; an article by W. H. Lloyd in 69 *Univ.Penn. Law Review*, p. 20; Hatschek, *op. cit.*, p. 118.

[16] Apparently no mention of this "special Act" can be found on the Rolls of Parliament. H. of C. Report No. 413 of 1843, p. 4.

[17] See, to the same effect, Year Book, 4 Hen. VII, 18, though the entry is very terse. A Bill of Attainder (1488) had been assented to by the King and Lords, but not by the Commons. All the judges held it was not an Act. The relevant entry is as follows: "En le Parlemt le Roy voul' q un tiel soit attaint, e pd' ses t'rs, et les Snrs assent, et: rie fuit ple des Comons. Purq Touts les Justices ten cleremt, q c ne fuit Act. Purq il fuit restor, etc."

[18] See Hatschek, *op. cit.*, p. 118.

that the Act was void, but it will be observed that he was not prepared to enforce it without "more certainty of the matter."

Pylkington's Case is admittedly old and no final decision was reported. Nevertheless it has been brought up in successive editions of *Erskine May* [19] and *Craies* as warranting doubt as to what the law may be. That there is no room for dogmatism on the point may be seen from the delicacy with which Maitland [20] approached it:

> "Suppose a Bill carried through the House of Commons; the Lords make amendments in it: it ought then to go back to the Commons in order that they may consider whether they will assent to the Bill thus amended. But suppose that this step is omitted; that the Bill is then presented to the King and that he gives his assent. Is this Bill a statute? I take it that it is not; but the question how far a court of law would hold itself bound by a statement on the Bill that it had received the assent of King and both Houses, whether it would permit a litigant to dispute this statement, is a somewhat difficult question. . . . Perhaps a court of law would allow a litigant to prove that as a matter fact this document had never received the consent of King, Lords and Commons; but I am not sure of this."

Despite these doubts, however, it may be that English courts would look no further than the Parliament Roll. There is certainly authority which points that way. For example, in *The King and Hunsdon* v. *The Countess of Arundel* [21] it was held that an Act of Parliament being "a high record must be tried only by itself *teste meipso*," [22] and a clear opinion was expressed that neither the Parliamentary Journals nor any other evidence was admissible to "satisfie, destroy or weaken the Act." [23]

It is submitted, however, that this line of authority could not help the Government in the *Vote Case*. The enrolled document is conclusive of its validity as an Act only if it shows on the face of it that everything has been done which the law of England prescribes

[19] The case was mentioned in the first 13 editions, but has been omitted from the 14th and 15th.

[20] *The Constitutional History of England*, pp. 381–2.

[21] 80 E.R., pp. 258–261. The case was heard in 1617 before Hobart (C.J., C.P.), Coke (C.J., K.B.) and also (apparently) the Lord Chancellor and the Master of the Rolls. See also *College of Phisitians* v. *Cooper* (1675) 84 E.R., pp. 894–5, where it was said: "though the Statute Roll be but a transscript of the bill, it hath always been accepted as the law"; *Earl of Oxford* v. *Lord Willoughby*, Jones Reports (1675) p. 103; *Clayden* v. *Green*, L.R. 3 C.P. 511, at p. 522; *Halpin* v. *Att.-Gen.* [1936] I.R. 227.

It may be noted in passing that these cases are more directly in point than *Wauchope's Case* (*supra*, note 12), which turned on the incontrovertible fact that the courts have no jurisdiction to inquire into the observance of Standing Rules. The absence of assent to a measure by one of the Houses is, however, a different matter. See note 24 below.

[22] 80 E.R. 260, lines 8, 9 and 10.

[23] 80 E.R., p. 260, lines 8 and 9, and see the second paragraph.

for the making of an Act of Parliament."[24] But if—to quote the judgment in *The King* v. *The Countess of Arundel*[25]—the record "carry its death wound in itself" then "the parchment, no, nor the great seal will not serve" to validate it. And, as we shall see presently, the Vote Act did in fact "carry its death wound in itself."

There are some interesting remarks in *The Prince's Case*[26] as to what is a sufficient "death wound." Thus, an Act though entered in the Parliament Roll is no Act if it

> "be penned, that the King with the assent of the Lords or with the assent of the Commons, for three ought to assent, *scil.*, the King, the Lords and the Commons, or otherwise it is not an Act of Parliament; and by the record of the Act which of those gave their assent, and that excludes all other intendments that any other gave their assent."[27]

It is not easy to give modern examples of a realistic kind where the English courts might be called upon to apply the principles enunciated in *The Prince's Case*,[28] though the Parliament Act, 1911, suggests "possibilities." Section 7 thereof provides that the maximum duration of Parliament shall be five years. It is clear that if the Queen, Lords and Commons wished to extend the life of

[24] For example, that there has been the triple assent of Queen, Lords and Commons. "That sovereign power (namely Parliament) can make or unmake laws; but the concurrence of the three legislative estates is necessary," *per* Denman C.J. in *Stockdale* v. *Hansard* (1839) 9 A. & E. 1. See also *Bowles* v. *The Bank of England* [1913] 1 Ch. 57, and notes 27 and 28 below.

[25] 80 E.R. at p. 260, second paragraph.

[26] 77 E.R. 481, cited by Centlivres C.J. in the *Vote Case*, 1952(2) S.A. 428, at p. 469.

[27] At p. 505. Francis Hargraves, in a note upon Coke's Littleton, 15th ed., Vol. 1, s. 234, says: "Every statute must be made by the King with the assents of the Lords and Commons; and if it appears *by the Act* that it was made by two of them only, it is no statute." (My italics.)

[28] It has been suggested by Professor Wade (Introduction to *Dicey's Law of the Constitution*, 9th ed., p. xxxviii), Mr. Latham (*The Law and the Commonwealth*, Hancock's *Survey*, p. 523, note 3), and Professor Gray (*Nature and Sources of Law*, 2nd ed., p. 76), that according to the law of the British Constitution the bicameral process of law-making is an imperative rule, with the result that were the Queen, the Lords and the Commons to meet in a single joint assembly and vote by a majority (or even unanimously) they could not enact a statute. Professor Wade specifically states that "they could not enact a single statute *to which the courts* would be bound to give effect." (My italics.) Professor Gray's view, expressed in 1909, was quoted with apparent approval by Sir Frederick Pollock in his *History of the Science of Politics*, 1923, p. 52, note 1.

On this point the following remarks of Centlivres C.J. in the *Vote Case*, at p. 470, are interesting: "It would indeed be surprising if a Government which is in a minority in the House of Commons could, by advising the Sovereign to convene a joint sitting of the House of Lords and the House of Commons, swamp the majority in the Commons by the votes of the Lords."

Hood Phillips, *Constitutional Law*, 1952, p. 44, doubts the necessity for separate assents by the Lords and Commons. He quotes, inter alia, Pollard's statement that "Parliament still acts as one body in all its solemn functions." But was not Pollard dealing with the old requirement that the Royal Assent should be given by the Sovereign personally in the presence of the Commons, *en parlement devant la commune*? Rot.Parl. II. 165. See Pollard's previous sentence, *Evolution of Parliament*, p. 123. Compare the modern ceremony when the Royal Assent is given by Commissioners.

Parliament beyond five years, section 7 would be no obstacle.[28a] And this in fact took place during World War II. But suppose an attempt were made to prolong the life of Parliament beyond the five years by legislation which omitted the assent of the Lords, purporting to be passed under the Parliament Act? Is it likely that the courts would accept such "legislation" as an authentic expression of the will of the British Parliament?[29]

There was, however, no need to look far for a "death wound" in the "legislation" with which the South African Appeal Court was concerned in the *Voters' Case*. For, as pointed out by Centlivres C.J., the Vote Act (No. 46 of 1951)

> "states that it was enacted by the King, the Senate and the House of Assembly. Prima facie therefore each constituent element of Parliament functioned separately in passing the Act. The original of that Act signed by the Governor-General and filed with the registrar of this court bears the certificate of the President of the Senate and the Speaker of the House of Assembly to the effect that it was passed by the Senate and the House of Assembly respectively. This clearly shows that the Act was not passed by the two Houses of Parliament sitting together."[30]

It is interesting to note that Centlivres C.J. left undecided the question whether the enacting clause in the enrolled copy is conclusive as to what it states. Thus he said[31]:

> "Had Act 46 of 1951 stated that it had been enacted by the King, the Senate and the House of Assembly in accordance with the requirements of sections 35 and 152 of the South Africa Act, it may be that courts of law would have been precluded from inquiring whether that statement was correct."

The South African law on the point is not free from doubt. Thus, in *R.* v. *Ndobe*[32] the Appellate Division held that "the court naturally assumes, *until the contrary appears*, that any Act of Parliament has been validly passed," and de Villiers C.J. specifically mentioned "proof aliunde."[33] If the enacting clause is always to be accepted at its face value, the requirements of the entrenched sections might conceivably be defeated by a fraudulent or negligently erroneous statement that a measure had been duly passed.

[28a] See below, pp. 286 *et seq.*

[29] It is most unlikely that a Speaker's certificate of any kind would be endorsed on such "legislation"; but even if it were, it could not validate the measure despite the wide terms of s. 3 of the Parliament Act in regard to certificates "given under this Act." The provisions of the Act specifically do not cover Bills to extend the maximum duration of Parliament (see s. 2 (1)), and it is submitted that a certificate in respect of such legislation could not competently be "given under this Act."

In any event, the conclusiveness of a Speaker's certificate under the Parliament Act probably relates only to what it actually certifies.

[30] 1952(2) S.A. at p. 469.

[31] 1952(2) S.A. at p. 469.

[32] [1930] A.D. 484.

[33] At p. 497.

But whatever the law on this particular point might be,[34] it was abundantly clear from the enrolled copy of the "Act" in the *Vote Case* that the provisions of the entrenched sections had *not* been observed.

Two further observations should be made under this head. First, the conclusiveness—as far as it goes—of what is stated in the enrolled copy of an Act has nothing whatever to do with Parliamentary sovereignty; for the rule may apply equally to non-sovereign legislatures.[35] It is simply a *rule of evidence* determining *how far* courts may pursue an inquiry into the observance of legal rules. The point at which the line is to be drawn depends on considerations of practical convenience and not on inferences from any notion of sovereignty.

Secondly, in exercising jurisdiction to inquire into the authenticity of an alleged Act of Parliament, the courts plainly do not set themselves up as regents over Parliament. They do not seek to control the legislature.[36] On the contrary, the inquiry is simply: has Parliament spoken?[37]

[34] s. 67 of the South Africa Act provides:

"As soon as may be after any law shall have been assented to in the King's name by the Governor-General . . . the Clerk of the House of Assembly shall cause two fair copies of such law, one being in the English and the other in the Dutch language (one of which copies shall be signed by the Governor-General), to be enrolled of record in the office of the Registrar of the Appellate Division of the Supreme Court of South Africa; and such copies shall be conclusive evidence as to the *provisions* of every such law." (My italics.)

Quaere: What is the scope of s. 67 and, more particularly, of the word "provisions"? If an Act, as enrolled, refers to chairs, it would presumably not be competent to show that in fact the legislature had dealt with tables. Does the enacting clause, *quoad* the entrenched sections, fall within the purview of s. 67?

The American cases are conflicting. Wigmore, *Evidence*, s. 1350, after reviewing the pros and cons, favours the conclusiveness of the enrolment on such matters as quorum and majority requirements, even though this may result in defeating a constitutional guarantee. An instructive discussion of recent American decisions is given by J. A. C. Grant in an article in the *Western Political Quarterly*, Vol. 3, 1950, pp. 364 *et seq.*; I am indebted to Mr. S. A. de Smith of the London School of Economics for referring me to this article.

It would seem that the last word on the subject in the U.S.A. has not yet been spoken. In fact, Grant referring to *Christoffel* v. *United States*; 338 U.S. 84 (1949) poses the questions: "Does the *Christoffel Case* mark a new era in the relations of Court and Congress? . . . Are the decisions of Congress final on (quorum and majorities) or are they subject to review by the courts?" *Op. cit.*, pp. 364–5.

[35] Thus, as we have seen, the rule may apply in the U.S.A., note 34. It is also relevant that the provisions of s. 67 of the South Africa Act are repeated in s. 91, which deals with Provincial Council Ordinances, yet the Provincial Councils are plainly non-sovereign legislatures.

[36] This was clearly brought out by Centlivres C.J. in the *Vote Case* at p. 456. The court's duty, he said, "is simply to declare and apply the law and it would be inaccurate to say that the court in discharging that duty is controlling the Legislature. . . . It is hardly necessary to add that Courts of Law are not concerned with the question whether an Act of Parliament is reasonable or unreasonable, politic or impolitic." See also *R.* v. *McChlery*, 1912 A.D. 199, at pp. 216, 220; *Hoani, etc.* v. *Aotea District Maori Land Board* [1941] A.C. 308, at p. 319.

[37] See note 37 on p. 281.

(ii) *Parliamentary Privilege*

It was urged by counsel that no English court had jurisdiction to adjudicate upon the procedural steps resulting in the enrolment of a measure as an Act of Parliament. On this principle it was clear, he said, that such questions as whether there had been three readings of a Bill, or a quorum or a majority in either House,[38] had to be determined in accordance with the *lex et consuetudo Parliamenti*, which was a branch of the law cognisable only in Parliament and not in a court of law. The Houses were privileged to be the exclusive arbiters of the lawfulness of their own proceedings. And he submitted that from the facts of publication and enrolment, the court had to accept that in the judgment of Parliament itself, the entrenched sections had been duly complied with. In support of this argument, he relied mainly on three well-known English cases, namely *Edinburgh and Dalkeith Railway Co.* v. *Wauchope*,[39] *Lee and Anor.* v. *Bude and Torrington Junction Railway Co.*,[40] and *Bradlaugh* v. *Gossett*.[41]

In *Wauchope's Case* the House of Lords was asked, but refused, to declare a private Act invalid on the ground that it had been passed without notice of intention to introduce having been given to interested parties as required by the Standing Orders of the House of Commons. In *Lee's Case* the Court of Common Pleas refused to declare a private Act invalid on the ground that it had been obtained by fraudulent recitals. And in *Bradlaugh* v. *Gossett*, Mr. Charles Bradlaugh, who had been excluded from the House of Commons and from taking the oath upon his election, challenged the order of the House on the ground, inter alia, that his position was regulated by the Parliamentary Oaths Act, 1899. The action failed.

These cases establish the elementary proposition that the Houses of the British Parliament are privileged to be the exclusive arbiters of the regularity of their own proceedings. But the question is: how was this relevant to the problem in South Africa?

Counsel for the Government replied by pointing to a South African statute, the Powers and Privileges of Parliament Act, 1911, section 36 of which provides that:

> "Save as is otherwise expressly provided by this Act, the Senate and the House of Assembly of the Union of South Africa, or either of them and the members thereof respectively shall hold, enjoy and exercise such and the like privileges,

[37] As to the definition of the Union Parliament—its structure and manner of legislating—and the vital differences between it and the British Parliament, see my essay on *Parliamentary Sovereignty*, pp. 4–8; 15 M.L.R., p. 286.

[38] *Quaere*: should not the quorum and majority provisions in the South Africa Act, ss. 30, 31, 49, 50, be treated as part of the legal definition of Parliament, and not, as in England, as *lex et consuetudo Parliamenti*? Whether, in the Union, a Speaker's certificate should be regarded as conclusive evidence on a quorum or majority is another matter.

[39] (1842) 8 C. & F. 710.

[40] (1884) 12 Q.B.D. 271.

[41] (1871) L.R. 6 C.P. 577.

immunities, and powers as at the time of the promulgation of the South Africa Act, 1909, were held enjoyed and exercised by the Commons House of the Parliament of the United Kingdom and by the members thereof and also such privileges, immunities and powers as are from time to time defined by any law of the Union but not exceeding those at the commencement of such law enjoyed and exercised by the Commons House aforesaid and by the members thereof respectively whether such privileges, immunities, or powers were so held possessed or enjoyed by custom, statute or otherwise: Provided always that no such privileges, immunities or powers shall at any time exceed those at the same time held and exercised by the Commons House of the said Parliament and by the members thereof."

It is submitted, however, that there are three reasons why the "privileges, immunities and powers," conferred by this section, cannot be relied on to exclude the jurisdiction of the South African courts in regard to the entrenched sections. One of these, namely the clear decision of the South African Appeal Court in *Ndobe's Case*,[42] has already been referred to in the first part of this article, and we shall confine attention here to the other two.[43]

First, there is no sound analogy between the provisions of the entrenched sections and rules relating to the internal proceedings of the Houses of Parliament. The relevant privilege of the Houses relates to rules and practices for facilitating legislative business within the walls of Parliament, whereas the entrenched sections were designed to protect substantive rights of citizens.[44]

Secondly, even if the entrenched sections would in England be classified as raising a question of *lex et consuetudo Parliamenti*, it must be remembered that the whole subject has a statutory origin in South Africa. Without statutory provision, the Houses of the Union Parliament would enjoy no greater privileges than those necessary for the proper conduct of legislative business.[45] The Powers and Privileges of Parliament Act (No. 19 of 1911), which extends the privileges of the House of Commons to the Union, was enacted by the Union Parliament functioning bicamerally in the ordinary way, and so cannot be invoked to render the entrenched sections nugatory.

[42] [1930] A.D. 484. See 15 M.L.R., at p. 291.

[43] See *Parliamentary Sovereignty, etc.*, pp. 45–6, where I discuss this question in relation to the decision of the Appeal Court in *Ndlwana* v. *Hofmeyr* [1937] A.D. 229.

[44] As the Appellate Division has now held, the South Africa Act contains two constitutional guarantees of substantive rights, namely, in regard to the Cape Franchise, s. 35, and the equality of the official languages, s. 137. See 1952(2) S.A., at p. 456 and especially at p. 470; and 1952(4) S.A., at pp. 779, 791, 794, 795.

[45] *Kielly* v. *Carson* (1841–2) 4 Moore P.C. 63; Halsbury, *Laws of England*, (Hailsham ed.), Vol. 11, p. 88; Forsyth, *Cases and Opinions on Constitutional Law*, 1869, pp. 25–6; Keir and Lawson, *Cases in Constitutional Law*, 3rd ed., p. 71, and Bourinot, *Parliamentary Procedure* (Canada), 2nd ed., pp. 253 *et seq.*

It should be added that the privilege of a legislative body to be the sole judge of the regularity of its internal proceedings, does not flow from sovereignty; for it may apply equally to non-sovereign bodies.[45a]

(iii) *Continental Examples*

Counsel for the Government also reminded the Appeal Court that many modern States (*e.g.*, France, Holland and Belgium) act in the belief that the legislature should be the sole interpreter of the Constitution. Judicial power to test the constitutionality of legislation was, he said, an American institution of dubious wisdom, which should find no place in South Africa, and he contended that it was a sound general principle, supported by the experience of Europe, that courts of law should have no jurisdiction in constitutional matters.

Citation of continental theory and practice in this field was, however, beside the point. Aversion to judicial review is due on the Continent [46] to factors (both historical and doctrinal) which have no application in Britain or South Africa. For example, the French view [47] that the ordinary courts cannot question the validity of an act of the legislature is based, inter alia, on French history [48] and legislation,[49] and an extreme form of the doctrine of separation of powers.[50] Influenced by French ideas, many

[45a] Thus, it applied to the Houses of the Union Parliament before the passing of the Statute of Westminster. See *R.* v. *Ndobe* [1930] A.D. 484, at p. 497.

[46] It is interesting to note, however, that the modern trend in European constitution-making increasingly favours judicial review.

[47] Which has materially influenced the position in Belgium and Holland—and in other European countries not mentioned during argument in the *Vote Case*.

[48] The climate of French thought has been strongly influenced by the obstructionism of the old " Parlements " during the pre-revolutionary period. Professor A. T. von Mehren, of Harvard, pertinently calls attention to the relatively low prestige of Continental judges as compared with that of their brethren in Britain and the U.S.A.: " The Judicial Process in the United States and France," 22 *Revista Juridica de La Universidad de Puerto Rico* (1952).

[49] The following texts are generally relied on as expressly prohibiting judicial review:

(a) *Decret sur l'organisation judiciaire*, Aug. 16, 1790.
(b) Constitution of 1791, Ch. V, tit. III, Art. 3.
(c) Art. 127 of the Penal Code of 1810.

But *cf.* Duguit, *Traité de Droit Constitutionnel*, 3rd ed., Vol. III, at pp. 669–70, who argues that these texts do not justify the interpretation generally given to them.

[50] Professor Max Radin, " Judicial Review of Statutes in Continental Europe," 41 *West Virginia Law Quarterly*, 112, at p. 116, writes: " With the revolution a wholly new aspect was put on the matter by the enthusiastic and unqualified acceptance of the doctrine of separation of powers. . . . The first Revolutionary Constitution, Aug. 16, 1790, expressly provides: ' The courts may not . . . impede (impecher) nor suspend the decrees of the legislative body. . . .' This has become the basis of the modern theory which in terms repudiates the American doctrine of judicial review."

On the whole subject, see J. Laferrière, *Manuel de Droit Constitutionnel*, 2nd ed., pp. 330 *et seq.*; P. Ducz, " Le contrôle jurisdictionnel de la constitutionalité des lois en France " in *Mélanges Hauriou*, 1829; " l'arret du Conseil d'Etat, Arrighi " in *Recueil Dalloz*, 1938, Part III, p. 1 (opinion of M.

European communities have felt that "problems of government are so entirely different from those of private and commercial intercourse that the law relating to them should breathe a different atmosphere, and that specialist judges should deal with them." [51] But this notion is quite alien to the law of England and of South Africa.[52] And if proof of this be needed, it is to be found in the rule that the ordinary courts of law in England, no less than in the Union, are entitled to determine the precise area of the privileges of the Houses of Parliament, though within the area so determined the courts recognise that they have no jurisdiction.[53] Moreover, both the English and the South African courts, unlike the ordinary French courts,[54] regularly test the validity of delegated legislation.

(iv) *Absence of express clause*

In support of the view that the South African courts have no jurisdiction to inquire into the due observance of the entrenched sections, reliance has been placed on the fact that the Constitution makes no *express* provision for it, whereas in the case of Provincial Council Ordinances, it is specifically stated that the various divisions of the Supreme Court shall have jurisdiction in all matters "in which the validity of any provincial ordinance shall come into question." [55]

The absence of an express clause is not conclusive. Thus, the power of a judicial review is perhaps more extensively used in the U.S.A. than anywhere else, yet there is no clause in the Federal Constitution which expressly confers that power on the United States Supreme Court. Indeed, where a Constitution protects individual rights with the sanction of legal invalidity,[56] it is not unreasonable to assume that the courts have jurisdiction in the absence of provision to the contrary.[57]

Latournerie and the note by M. Eisenmann); Laroque, "Les Juges français et le contrôle de la loi," 33 *Revue de Droit Public*.

For criticism of the traditional French view, see Duguit, *loc. cit.*, and M. Hauriou, *Précis de droit constitutionnel*, 2nd ed., pp. 282 *et seq.*

[51] See the discussion in Stephen's *Commentaries on the Laws of England*, 21st ed., Vol. III, p. 341.

[52] See, with specific reference to the jurisdiction of the courts, Keir and Lawson, *Cases in Constitutional Law*, 3rd ed., p. 1: "There is in England nothing analogous to the French doctrine of *separation des pouvoirs*"; Thayer, *Cases on Constitutional Law*, Vol. 1, p. 8: "English law lends no countenance to the dogma of the separation of powers as that doctrine is understood by Frenchmen"; Stephen, *op. cit.*, p. 341; and Wade's *Introduction to Dicey*, 9th ed., p. xxxix.

[53] This was established beyond dispute in a series of nineteenth-century cases. Carl Wittke, *The History of English Parliamentary Privilege*, 1921, Chap. 6; Keir and Lawson, *op. cit.*, p. 76.

[54] For the position in France, see Goodnow, *Comparative Administrative Law*, Vol. 2, pp. 172–6.

[55] s. 98 (3) (*b*). See Professor Wade's opinion, *Cape Times*, March 24, 1952.

[56] As do the entrenched sections.

[57] In *Minister of the Interior* v. *Harris*, 1952(4) S.A. 769, at p. 787 (the *High Court Case*), Schreiner J.A. said: "The Constitution makes no express provision for the determination of questions of validity or invalidity and must

Section 98 (3) (*b*) of the South Africa Act, which expressly confers jurisdiction on the Provincial and Local Divisions of the Supreme Court in regard to Provincial Council Ordinances, carries the matter no further. The true explanation of this section was given by Bristowe J. in *R.* v. *Thompson.*[58] Thus:

> "On the passing of the South Africa Act the Supreme Courts of the various colonies became provincial divisions of the Supreme Court of South Africa, and under section 98 (3) each such division retained the original jurisdiction which the corresponding court had previously enjoyed. This would no doubt be sufficient to enable it to deal with the validity of any Ordinance made by its own Provincial Council; but there might have been a doubt whether it could have exercised similar powers with regard to the Ordinances of other provinces and it seems to me that it was to remove any question of this kind that clause (b) of this subsection was passed. *It is an equalising provision, designed to give every division of the Supreme Court equal jurisdiction with every other division.*

(v) *Unitary and Federal Constitutions*

Finally, it has been contended that judicial power to determine the validity of legislation is anomalous in the case of a unitary constitution, and in support of this view Professor E. C. S. Wade's opinion on the entrenched sections has been quoted. "It is only in States with a federal type of constitution," writes Professor Wade, "that this function (*i.e.*, to declare the invalidity of unconstitutional legislation) is assumed by, or in modern times given to, the courts. The Republic of Ireland is an exception."[59]

therefore be taken to have left such determination to the Courts of Law of the land." A similar line of reasoning was adopted by some German courts in impugning the validity of legislation under the Weimar Constitution. For example, 4 E.R.V.G. 168 (Nov. 21, 1924): s. 8 of the Military Pensions Act, 1922, was declared void because it had not been passed by a two-thirds majority as required by Art. 76 of the Constitution. And see 111 E.R.G. 320 (Nov. 4, 1925). See also Gaston Jèze in *Revue de Droit Public*, Vol. 29, p. 138.

Centlivres C.J. has expressed the view that the sanction of invalidity must be applied by the courts precisely because they would not be administering the law of the land if they gave effect to an invalid measure. He says: "The method employed by s. 152 to entrench the rights conferred by ss. 35 and 137 is the sanction of invalidity. This can only mean invalidity in law as determined by Courts of Law which consider issues raised by parties who bring their disputes before such courts. A constitution might provide for an entrenchment which cannot be enforced by Courts of Law, *e.g.*, the Swiss Constitution, see Bryce's *American Commonwealth*, 3rd ed., p. 260, but this is not what our Constitution prescribes. In our Constitution the entrenchment is effected by applying the sanction of legal invalidity—a sanction which can only be applied by Courts of Law. Those courts cannot, therefore, shirk the duty imposed on them of coming to the aid of individuals whose rights conferred by the sections referred to have been infringed or who have reasonable grounds for thinking that their rights will be interfered with." See *Minister of the Interior* v. *Harris*, 1952(4) S.A. at pp. 779–80; also, *R.* v. *McChlery* [1912] A.D. 199, at p. 219; *James* v. *The Commonwealth* [1936] A.C. 578, at p. 613.

[58] [1914] T.P.D. 426. The headnote—which is borne out by the judgment—reads as follows: "The Supreme Court has inherent jurisdiction—apart from the provisions of s. 98 (3) of the South Africa Act, 1909—to decide on the validity of Ordinances passed by the Provincial Council."

[59] *Cape Times*, March 24, 1952.

It is not suggested, however, nor could it be, that the power of judicial review is incompatible with a unitary constitution, and unless the argument can be pushed to that length, the unitary nature of the Union's Constitution is irrelevant. In any event, judicial review is not anomalous under modern unitary constitutions, nor is it confined to Ireland. Within the Commonwealth, Ceylon is an example of a country with a unitary constitution where the courts have power to adjudicate upon the validity of legislation.[60] And on the Continent, Portugal,[61] Norway,[62] Greece,[63] and Italy [64] have unitary constitutions which place limitations upon the powers of the legislature, yet the " testing power " obtains.

The Structure and Powers of Parliament

In addition to the arguments dealt with above, three other grounds have been relied on in support of the contention that the entrenched sections conflict with the sovereignty of the Union Parliament. Thus it has been said that:

(i) the entrenched sections cannot be altered by the Union Parliament, whereas a sovereign legislature may make or unmake any law [65];

(ii) a legislature can only rank as sovereign if there is one manner of law-making which may always be adopted [66];

(iii) a sovereign Parliament cannot bind itself or its successors.[67]

(i) *Power to make any law.* The first submission may be shortly dealt with. Accepting Dicey's view that capacity to make or unmake any law [68] is an essential characteristic of a sovereign legislature, the fact is that the entrenched sections are not unchangeable by the Union Parliament. It is quite true that the Union Parliament, functioning bicamerally, cannot change them, but it is equally true that the Union Parliament, *duly functioning in terms of the South Africa Act*, may do so.[69] There is no sufficient warrant for defining

[60] Jennings, *The Constitution of Ceylon*, 2nd ed., pp. 64, 199.

[61] Article 122 of the 1933 Constitution expressly forbids the courts from applying laws which violate the Constitution.

[62] Laferrière, *op. cit.*, p. 329. *Cf.* B. A. Arneson, *The Democratic Monarchies of Scandinavia*, van Nostrand, 1949, p. 161. The position in Sweden (and probably also Denmark) is different. Arneson, *op. cit.*, pp. 177, 153.

[63] Laferrière, *op. cit.*, p. 329; *Journal de Droit Public*, 1905, p. 181.

[64] The new Italian Constitution, 1948, sets up a Constitutional Court of 15 judges, five chosen by the President, five by Parliament in joint session, and five by the ordinary and administrative courts. See art. 135. The case of Italy differs from the others cited in the text; for in those cases the ordinary courts have jurisdiction.

[65] In the *Vote Case* this was argued by Counsel for the Government, quoting Dicey, *op. cit.*, pp. 40, 72, 88, 91.

[66] This, too, was put forward by Counsel for the Government, citing Dicey, *op. cit.*, pp. 88, 91.

[67] This submission was made both by Counsel for the Government and by Professor Wade, who cited *Vauxhall Estates* v. *Liverpool Corporation* [1932] 1 K.B. 733, and *Ellen Street Estates* v. *Minister of Health* [1934] 1 K.B. 590.

[68] As regards possible qualifications of this, see below, pp. 291 *et seq.*

[69] 1952(2) S.A. 428, at p. 468, *per* Centlivres C.J.; *Parliamentary Sovereignty, etc.*, p. 5.

the Union Parliament as an *exclusively* bicameral parliament, functioning for all purposes in exactly the same way as the British Parliament.[70] "One is doing no violence to language," said Centlivres C.J.,[71] "when one regards the word 'Parliament' as meaning Parliament sitting either bicamerally or unicamerally in accordance with the requirements of the South Africa Act." And the same point was made with characteristic vigour by van den Heever J.A. "Only British bias," he said, "could prompt the thought that since such a power (that is to make all laws bicamerally by a simple majority) resides in the legislature in Britain, our Parliament *as ordinarily constituted* must necessarily have it too."[72]

(ii) *One manner of law-making.* The second contention raises the question whether Dicey was correct in equating constitutional "flexibility" with Parliamentary sovereignty.[73] In so doing, he accurately explained the position which obtains in England, but one should be careful not to regard statements descriptive of the working of the British Constitution as propositions of universal validity.[74] And did not Dicey go too far in suggesting that constitutional flexibility is necessarily implicit in "a true conception of the sovereign in the legal sense"?[75] There seems to be no reason in theory for insisting on flexibility as a criterion—unless it be thought that sovereignty must be indivisible. But as Bryce long ago pointed out, this dogma appears to arise out of confusion between sovereignty in the legal sense and actual mastery, or, to use Bryce's own terms, between legal sovereignty and practical sovereignty.[76] Sovereignty in the legal sense may well

[70] 15 M.L.R., p. 287, note 18 and p. 290. For fuller discussion, see *Parliamentary Sovereignty, etc.*, pp. 4–8, and Professor K. C. Wheare's *Statute of Westminster*, 5th ed., Appendix VIII.

[71] 1952(2) S.A. 428, at p. 463.

[72] 1952(4) S.A. 769, at p. 791 (*The High Court Case*).

[73] See Dicey, *op. cit.*, p. 91, where he says: "These traits (of sovereignty) are all exemplifications of the quality which my friend Mr. Bryce has happily denominated the 'flexibility' of the British constitution."

On flexibility, see Bryce, *Studies in History and Jurisprudence*, Vol. 1, pp. 145 *et seq.*

[74] After enumerating the characteristics of the British Parliament, Dicey proceeded, in effect, to classify the rest of the then existing legislatures of the world as "non-sovereign."

[75] Dicey uses the phrase, *op. cit.*, at p. 72; and see p. 87, where he speaks of "deducing the characteristics of Parliamentary sovereignty from the term itself." In other places he wrote more specifically, confining his remarks to the British Constitution. Thus: "The principle of Parliamentary sovereignty means . . . that Parliament, . . . *under the English Constitution*," p. 39; "the essential features of a sovereign Parliament *like that of England*," p. 87. (My italics.)

[76] Bryce, *Studies in History and Jurisprudence*, Vol. 2, p. 70.

"The term sovereign," writes Professor McIlwain, "has no proper application beyond the domain of law. It is a purely juristic term and it should convey a purely juristic idea. It has no proper meaning if carried beyond the sphere of law into the sphere of mere fact. Sovereignty is authority, not might": *Constitutionalism and the Changing World*, pp. 29–30. Similarly, Bryce says that "legal sovereignty is created by and concerned with law and law only." It represents "merely the theory of the law." *Studies in History and Jurisprudence*, Vol. 2, p. 56. Sir Ivor Jennings apparently prefers to use the term

be divisible [77] and this, it is submitted, is in fact the position in South Africa.[78] It was the view which commended itself to the Appeal Court. Thus, Centlivres C.J., quoting Bryce, said: "In the case of the Union legal sovereignty is or may be divided between Parliament as ordinarily constituted and Parliament as constituted under section 63 and the proviso of section 152." [79]

(iii) *Power to bind successors.* There remains the alleged incapacity of a sovereign Parliament to bind itself or its successors. On that hypothesis, it has been argued that "Parliament cannot bind itself as to the form of subsequent legislation, and, therefore, the provisions of a later Act, in so far as they are inconsistent with an earlier Act, must prevail." [80] The Vote Act had not been passed consistently with the entrenched sections and so—the argument ran —those sections had been repealed.

It is submitted that this argument was not relevant to the issue in the *Vote Case*.[81] The continued efficacy of the entrenched sections clearly did not depend upon whether it is competent for the *Union Parliament* to bind itself or its successors by imposing rules regarding the method of law-making; for the entrenched sections were enacted by the British, not by the Union Parliament.[82] It is the South Africa Act [83] which created the

"sovereignty" to designate actual mastery; for he says "legal sovereignty is not sovereignty at all. It is not supreme power": *The Law and the Constitution*, 3rd ed., pp. 139–40.

[77] Bryce, *loc. cit.*; Salmond, *Jurisprudence*, 10th ed., pp. 91–2; Anson, *Law and Custom of the Constitution*, 5th ed., Vol. 1, p. 4; Buckland, *Reflections upon Jurisprudence*, pp. 85–7.

The formal unity of a legal system may be preserved in theory, by asking, not *who* is sovereign in a given community, but "who, *or what*, is the sovereign, in the sense of being the final adjustment-centre of the legal association?" This is the question formulated by Sir Ernest Barker, *Principles of Social and Political Theory*, p. 61, and by Lord Lindsay of Birker, *The Modern Democratic State*, Chap. IX. Both Barker and Lindsay answer it—in much the same way as Kelsen—by postulating the ultimate sovereignty of a "constitution," that is to say, a set of rules of law which indicate who shall have authority to govern, how much authority they have, and how that authority is to be exercised. Barker applies the principle of "the sovereignty of the Constitution" to Britain. See note 89 below. This approach obviates the fruitless search for a single *person* or *body of persons* who have all legal power under a federal constitution like that of the U.S.A.

[78] See *Parliamentary Sovereignty, etc.*, pp. 4, 7.

[79] 1952(2) S.A. at p. 464. Centlivres C.J. expressed the view that the ordinary bicameral process of law-making was imperative for matters falling outside the purview of the entrenched sections. See at pp. 463, 470. In other words, a joint sitting is competent only for matters within the scope of the entrenched sections (a two-thirds majority then being required), or, in respect of other matters, in the event of a deadlock between the Houses (a simple majority then sufficing—s. 63).

[80] See Professor Wade's opinion, *Cape Times*, March 24, 1952.

[81] Namely, whether, upon a true construction, the Statute of Westminster had expressly or impliedly repealed or modified the entrenched sections. See the formulation of the issue by Centlivres C.J. 1952(2) S.A. at pp. 449, 459, 466. And see 15 M.L.R. at p. 286; *Parliamentary Sovereignty, etc.*, p. 20.

[82] It is not possible within the scope of this article to discuss the suggestion made (for example) by Dean Erwin N. Griswold, of Harvard, that "the action of the

[83] 9 Edw. 7, c. 9.

Union Parliament, and defined its structure, its powers and the mode of their exercise.[84] Accordingly, once it was clear that the *Statute of Westminster* had not expressly or impliedly repealed or modified the entrenched sections,[85] it followed—as the Appeal Court held—that the constituent elements of the Union Parliament were bound to observe the rules which for the time being governed the method of law-making.[86] And it was immaterial that such rules had originally been prescribed by the Parliament of the United Kingdom.[87]

Parliament at London was merely the formal statement or ratification of what had in substance been done by constituent action in South Africa (at the National Convention, 1909)." *Harvard Law Review*, March, 1953. See also Edward McWhinney, 30 *Canadian Bar Review*, 692, and 31 *Canadian Bar Review*, 52.

This aspect was raised in my essay on *Parliamentary Sovereignty, etc.*, p. 49, where it was shown that it was unnecessary—as the judgment of the Appeal Court established—to justify the continued efficacy of the entrenched sections by contending that the source of authority of the South Africa Act was, *ab initio*, the will of the South African people. See also note 87, below.

[84] In the *High Court Case*, 1952(4) S.A. at p. 791, van den Heever J.A. summed up the position with great clarity: "The fact remains," he said "that the South Africa Act is our constitution and apart from that constitution there are no organs of State and no powers." See also *Parliamentary Sovereignty, etc.*, pp. 4 *et seq.*

[85] On the questions of statutory interpretation involved, see *Parliamentary Sovereignty, etc.*, pp. 20 *et seq.*, and 15 M.L.R. 288–90. These problems are lucidly discussed, with special reference to the *Vote Case*, by Professor K. C. Wheare, *The Statute of Westminster*, 5th ed., Appendix VIII. See also Griswold, 65 *Harvard Law Review*, pp. 1361 *et seq.*

[86] "At the outset," said Centlivres C.J., 1952(2) S.A. at p. 459, "it is necessary to point out that the Statute of Westminster contains no express repeal of those sections. The most that could possibly be contended for is that that Statute impliedly repeals those sections," and, at p. 467, after showing that upon a proper construction, no implied repeal or alteration had occurred, he said "If the Statute of Westminster did not have the effect of repealing or modifying the entrenched clauses of the South Africa Act, then those provisions remained intact after the Statute was passed and the Union Parliament could not by means of an Act . . . passed bicamerally, repeal or modify those entrenched clauses."

The South Africa Act had created the Union Parliament, defined its structure and powers and prescribed the mode of their exercise. Its provisions were law before Westminster; they continued to be law thereafter. van den Heever J.A. put this beyond doubt when he said: "Neither the people nor any other constituent authority has conferred upon Parliament as ordinarily constituted the power to alter the Cape franchise. In fact such power has been expressly withheld. Parliament as ordinarily constituted has not as yet effectively and finally assumed such power in a revolution, nor has Parliament functioning unicamerally with the requisite majority conferred such power. There is no other conceivable source of such power; consequently it does not exist." 1952(4) S.A. at p. 791.

[87] On this point, van den Heever J.A. pertinently observed: "The fact that our Constitution is the creature of the British Parliament seems to me a fortuitous circumstance which is quite irrelevant. . . . I would have been of the same opinion if it had been framed by a constituent assembly of the people, made by Solon or extracted from the laws of Hammurabi": 1952 (4) S.A. 769, at p. 791.

In the context in which this passage appears, van den Heever J.A. was dealing with a contention that after the Imperial abdication of Great Britain, by virtue of the Statute of Westminster, the South Africa Act lost its cohesive force. He disposed of the contention as follows: "That assumes that as soon as the policeman is round the corner there is no law." Quoting Jellinek, the learned judge suggests that the cohesive force of the South Africa Act may now rest on *die normirende Kraft des Factischen*. In this regard, see my discussion in 15 M.L.R. at p. 295.

This conclusion is not incompatible with Parliamentary sovereignty; unless it be thought that in the case of a sovereign legislature, there can be *no binding rules of law whatever* governing its structure and mode of functioning—a proposition which is surely unsound even in regard to the Parliament of the United Kingdom. On this point, I can do no better than quote Sir Frederick Pollock, who, in commenting on Bodin's (often misunderstood) maxim that the sovereign is *legibus solutus*,[88] makes it clear that every composite sovereign must have rules in accordance with which it declares its will, and "in making new rules it must proceed according to the existing ones."[89] It is perhaps hardly necessary to add that the question of implied repeal of the entrenched sections *by the Union Parliament* could not arise in the *Vote Case*. The constituent elements of the Union Parliament, functioning bicamerally, cannot repeal the entrenched sections expressly—nor can they do so impliedly.[90]

Quite apart, however, from the question of its relevance in the *Vote Case*,[91] the proposition that a sovereign Parliament cannot

[88] *Six Livres de la Republique* (Paris, 1576–7), Book I, Chap. VIII, pp. 96, 104. According to the better view, Bodin did not equate sovereignty with lawlessness. See McIlwain, *Constitutionalism and the Changing World*, pp. 26 *et seq.*, pp. 47 *et seq.*, Shepard, 45 *Political Science Quarterly*, pp. 585 *et seq.*, and Pollock, *Science of Politics*, 1923, p. 54. On the influence which Bodin might possibly have had on Sir Thomas Smith's glowing affirmation of the sovereignty of the British Parliament (*De Republica Anglorum*, Alston's ed., Bk. II, Ch. II), see Pollock's *First Book of Jurisprudence*, 6th ed., p. 264, and particularly Hatschek, *op. cit.*, p. 605.

[89] Pollock, *History of the Science of Politics*, p. 52, note 1, quoting Gray, *The Nature and Sources of Law*. This proposition has often been formulated, perhaps never more lucidly than by Sir Owen Dixon: "The law existing for the time being is supreme when it describes the conditions which must be fulfilled to make a law. But on the question what may be done by a law so made, Parliament is supreme over the law": 1935 L.Q.R., at p. 603.

The British Constitution is often said to be "subordinate" and not "supreme," when it is meant to convey that it can be altered by Parliament in the same way as any other set of laws (*cf.* Wheare, *Modern Constitutions*, pp. 25, 26, 32); but, in a vital sense, the Constitution is supreme, in that the law prescribing *what is Parliament* must be observed in the very act of altering the Constitution. It is true, as Sir Ernest Barker points out, that in Britain these laws are few in number, somewhat vague and difficult to formulate (*cf.*, *e.g.*, note 28 above)—but, nevertheless, they exist. See *Principles of Social and Political Theory*, p. 62, note 1, and my essay on *Parliamentary Sovereignty*, etc., pp. 6–10.

It should not be forgotten that the British doctrine of Parliamentary sovereignty is a doctrine concerning legal sovereignty. "It is from the Common Law," writes Sir Maurice Amos, "that Parliament derives its legislative supremacy": *The English Constitution*, p. 24. Similarly, Jennings, *The Law and the Constitution*, 3rd ed., p. 144, says: "The Powers of Parliament, as Dicey admits, come from the law." And legal sovereignty, as Sir Ernest Barker emphasises, "is not a capricious power of doing anything in any way: it is a legal power of settling finally legal questions in a legal way": *op. cit.*, pp. 60–1.

[90] The leading South African cases on implied repeal are *New Modderfontein G. M. Co.* v. *Transvaal Provincial Administration* [1919] A.D. 367; *Freeman* v. *Union Government* [1926] T.P.D.; and *Krause* v. *Commissioner for Inland Revenue* [1929] A.D. 286.

[91] See note 32 below for cases where the question of the competence of the Union Parliament to prescribe a new manner of law-making may arise.

bind itself or its successors requires far closer analysis than it has yet received.[92] Within the limits of this article, however, it is not possible to give more than an outline of the subject, and to suggest the lines along which the solution of some of the main problems should be sought.

The topic has been discussed in connection with the granting of autonomy to countries in the British Commonwealth,[93] but is by no means confined to this sphere. Thus it has arisen in regard to the possibility of altering the constitutional structure of Great Britain, for example, by requiring a referendum on certain subjects[94]; and within the Commonwealth, proposals to introduce entrenched "Bills of Rights,"[95] have given it practical significance.

One of the earliest and best discussions in English law is to be found in Bacon's maxims.[96] He is quite clear that Parliament cannot prohibit itself from legislating on any subject, or from repealing any law. Thus[97]: "If an Act of Parliament be made wherein there is a clause contained that it shall not be lawful for the King, by the authority of Parliament, during the space of seven years to repeal and determine the Act, this is a void clause,[98] and the same Act may be repealed within the years." The reason for this, says Bacon,[99] is that a clause prohibiting repeal (*clausula derogatoria*) "doth deprive men of that which of all other things is most incident to human condition, and that is alteration or repentance."[1] He proceeds, however, to qualify the generality of

[92] A point to which Prof. W. Friedmann calls attention in his thoughtful article on "Trethowan's Case, Parliamentary Sovereignty and the Limits of Legal Change" (1950) 24 *Australian Law Journal*, 108. See also Jennings, *The Law and the Constitution*, 3rd ed., pp. 145 *et seq.*

[93] Mainly in regard to the effect of what might be called the "Westminster formula," namely s. 4 of the Statute of Westminster. For similar sections in other legislation, see s. 6 (4) of the Indian Independence Act, 1947; s. 1 (1) of the Ceylon Independence Act, 1947; and s. 1 (2) of the Ireland Act, 1949. References to current views on the Westminster formula are given in 15 M.L.R. 294, note 47.

[94] See, particularly, the discussions by Sir Owen Dixon in *Trethowan's Case* (1931) 44 C.L.R. 394, and Sir Ivor Jennings in *The Law and the Constitution*, 3rd ed., pp. 145 *et seq.*

[95] Such proposals have recently been made in South Africa and in Canada. See W. Glen How, "The Case for a Canadian Bill of Rights," 26 *Canadian Bar Review*, 759.

[96] Regula XIX. Bacon's *Works*, ed. Spedding, Ellis and Heath, 1859, Vol. VII, pp. 369–72.

[97] *Op. cit.*, p. 370.

[98] It is worth observing that Bacon will have no truck with the suggestion that an Act which purports to be irrevocable is good until repealed, a view held by Dr. W. Jethro Brown, *The Austinian Theory of Law*, p. 161. Bacon was of the opinion that such a law is either void or valid. Thus: "But *the law* is that the first law by the impertinency of it was void *ab initio et ipso facto* without repeal: as if a law were made that no statute should be made during seven years; *if the first statute should be good, then no repeal could be made thereof within that time.*" *Op. cit.*, p. 371. (My italics.)

[99] *Op. cit.*, p. 370. *Cf.* Bentham, *Works*, Bowring's ed. (1843), Vol. 2, pp. 401 *et seq.*

[1] There are some Roman texts, and a good deal of Romanistic learning, on the subject of irrevocability—particularly in regard to wills. See, *e.g.*, D.32.22. pr. (*Hermogenianus*) . . . *nemo enim eam sibi potest legem dicere ut a priori*

these remarks as follows: "And yet if the Parliament should enact in the nature of the ancient *lex regia*, that there should be no more Parliaments held, but that the King should have the authority of the Parliament; this act were good in law; *quia potestas suprema seipsum disolvere potest, ligare non potest.* . . . It is in the power of Parliament to extinguish or transfer their own authority, but not, whilst the authority remains entire, to restrain the functions and exercises of the same authority." [2]

The problem arose in a concrete form—giving rise to illuminating comment—in regard to Mr. Gladstone's Government of Ireland Bill, 1886.[3] The Bill was vaguely drafted,[4] but upon a likely interpretation,[5] it purported to reconstitute the Parliament of the United Kingdom. Out of the existing constituent elements, it was proposed to set up (a) an Irish Parliament; (b) a British Parliament [6]; and (c) a "special" Imperial Parliament—each differing in composition and authority from the previously existing Parliament of the United Kingdom.[7] Clause 39 (1) (*a*) provided that after an appointed day, those provisions of the new Constitution which were within the exclusive competence of the Irish Parliament could not be altered by the British Parliament save "with the consent of the Irish legislative body testified by an address to Her Majesty."

The legal effect of this measure was keenly debated by England's leading constitutional lawyers. Opinion was divided. Dicey, Anson and Sir Robert Finlay [8] considered that if the Government of Ireland Bill were passed, the British Parliament could not thereafter validly legislate for Ireland without the consent of the Irish

ei recedere non liceat. . . . Cf. D.29.7.6.2. Girard, *Manuel Elémentaire de Droit Romain*, 8th ed., p. 886, note 4. Cujacius, *Observationes*, XIV. 7 (*sub voce, clausula derogatoria*), discusses the texts, and applies the principle of D.32.22 pr. (above) to legislation by the Princeps. Thus: "*Princeps multo minus potest sibi legem dicere, ut a priori non possit recedere, quae omnia summe notanda sunt.*" These questions were discussed and disputed by the Glossators; and the flow of writing has continued ever since. As Bynkershoek, *Quaestiones Juris Privati*, 1774, Book 3, Ch. VI, observed: *De hac clausula multi multa disputant et circa hanc non una difficultas, nam ars deluditur arte.* The "analogy," if any, of wills must be used with considerable caution. See note 40, below.

2 *Op. cit.*, pp. 370–1.

3 Printed *in extenso* as an Appendix to Dicey's *England's Case Against Home Rule*, London, 1886.

4 Apparently for political reasons. See Dicey, *op. cit.*, p. 248; Anson, 2 L.Q.R. 427.

5 That given it by Dicey and Anson, for example.

6 Consisting of the "rump" of the existing Parliament of the United Kingdom, after the subtraction of Irish members.

7 Dicey, *England's Case Against Home Rule*, pp. 235–6.

8 As reported in *Hansard*, May 21, 1886, Finlay said: "The measure destroyed the Imperial Parliament as it now existed. It created out of the materials which the Parliament provided two Parliaments, the British Parliament on this side of the water and the Irish Parliament on the other side of the water": col. 1680. He entertained "the very gravest doubt" whether the British Parliament could repeal the Act except in terms of it: col. 1682.

Parliament. Bryce was of the contrary view.[9] "We cannot," he said,[10] "divest ourselves of the right to legislate for Ireland. There is no principle more universally assented to than the absolute omnipotence of Parliament, because there is nothing beyond or behind us.[11] . . . There is one limitation and one only upon our omnipotence, and that is, we cannot bind our successors, if we pass a statute annihilating our right to legislate it may be repudiated by our successors."

To this Dicey replied as follows:

(a) It was indisputable that a sovereign could not, *while retaining its sovereign character*, limit its sovereign powers.[12]

(b) "No principle of jurisprudence is more certain than that sovereignty implies the power of abdication . . . no fact is more certain than that a sovereign Parliament has more than once abdicated,[13] *or shared its powers.*"[14]

(c) Accordingly, "if it were said that the body which passed this enactment could also repeal it, then the judge might consider that that body, namely the Parliament of the United Kingdom, had in effect *ceased to exist*, and that the successor to its sovereign powers, if any, was not the British Parliament, . . . but the special Imperial Parliament."[15]

Anson pointed out that the statement that Parliament cannot bind its successors may be taken to be true, subject to two exceptions[16]; (i) where Parliament surrenders its sovereign powers over a certain area to another person or body; (ii) where a sovereign body divides itself into two; the terms of separation must then provide that one shall be subordinate to the other, or that both shall be independent, or that both shall be subordinate to the articles of their separation and to the written constitution so created.

[9] He was then Under-Secretary of State for Foreign Affairs. See *Hansard*, May 17, 1886, col. 1220.

[10] Quoted by Anson, 2 L.Q.R. at p. 435. See, to the same effect, Bryce, *Studies in History and Jurisprudence*, Vol. 1, p. 207.

[11] Does not Bryce here overlook the fact that it is the law of England which determines what *is* Parliament? Technically, as Sir Ivor Jennings points out, Parliament is not a permanent body: between dissolution and the next meeting there is no Parliament. See *The Constitution of Ceylon*, 2nd ed., p. 50; Stephen, *Commentaries on the Laws of England*, Vol. 4, p. 317. It is the existence of law governing the question what is Parliament, which averts a break in the continuity of the English legal system each time a Parliament is dissolved.

[12] *England's Case Against Home Rule*, p. 242. *Law of the Constitution*, 9th ed., p. 68, *in notis*.

[13] Dealing with abdication, Dicey says in his *Law of the Constitution*, 9th ed., p. 69 *in notis*: "A sovereign power can divest itself of authority in two ways only. It may simply put an end to its existence. . . . It may again transfer sovereign authority to another person or body of persons."

[14] *England's Case Against Home Rule*, pp. 244–5.

[15] *Op. cit.*, p. 246.

[16] 2 L.Q.R. at p. 440.

More recent discussion [17] has arisen out of certain remarks of Sir Owen Dixon in *Att.-Gen. for N. S. W.* v. *Trethowan.*[18] The court was faced with the problem whether the Parliament of New South Wales could effectively change the method of law-making so as to preclude future Parliaments from ignoring the new provisions and reverting to the former method. In the circumstances, the question presented no real difficulty, because the N. S. W. Parliament derived its powers, inter alia, from a statute of the United Kingdom—the Colonial Laws Validity Act (s. 5)—which specifically gave an affirmative answer.[19] But in the course of his judgment in the High Court of Australia, Sir Owen Dixon made comments which throw doubt on the proposition that a sovereign Parliament cannot bind itself or its successors. "It must not be supposed," he said, "that all difficulties would vanish if the full doctrine of Parliamentary sovereignty could be invoked." [20] And then, in a well-known passage, he posed the question of the possible effect of an Act of the British Parliament which contained a provision that no measure for its repeal should be valid unless first approved by the electors. He observed that if, notwithstanding the statutory prohibition, a repealing Bill received the Royal Assent without having been submitted to the electors, "the courts might be called upon to consider whether the supreme legislative power in respect of the matter had in truth been exercised in the manner required for its authentic expression, and by the elements in which it had come to reside." [21] One should note the caution of Sir Owen Dixon's approach. The answer, he said, might be "evident"; on the other hand, it might be "obscure." [22]

It is clear from this brief review that there is an unfortunate tendency to lump together a number of different questions. These should be formulated with precision and distinguished; for the same considerations do not necessarily apply to each. It is suggested that they may usefully be grouped under three heads [23]: (a) abdication, or total divesting of power, (b) partial divesting of power, (c) grant of power without divesting.

Under the first head, two questions may be posed.[24] First, may Parliament put an end to itself, without appointing a successor [25]?

[17] See, particularly, W. Friedmann, "Trethowan's Case, Parliamentary Sovereignty and the Limits of Legal Change" (1950) 24 *Australian Law Journal*, 103.

[18] (1931) 44 C.L.R. 394, at pp. 424 *et seq.*

[19] See the decision of the Privy Council [1932] A.C. 526.

[20] At p. 426.

[21] At p. 426.

[22] At p. 426.

[23] The suggested classification is tentative, and does not purport to be exhaustive; nor have I attempted a complete enumeration of examples.

[24] Both were raised, and answered affirmatively, by Dicey, *Law of the Constitution*, 9th ed., p. 69 *in notis*. See also Anson, *Law and Custom of the Constitution*, 5th ed., p. 8.

[25] *Quaere*: is there an *exact* example in English history?

Secondly, may it irrevocably transfer *all* its sovereign authority to another person or body of persons? [26]

Under the second head, one may again distinguish two questions. First, may Parliament irrevocably divest itself of *some* of its powers, without transferring them to another person or body? To give Bacon's example, may it effectively prevent itself from repealing a particular law? [27] Secondly, may it divest itself of some of its powers and transfer them irrevocably to another? For instance, may it effectively enact that in future it shall not be competent for the Queen, Lords and Commons to nationalise industries without first obtaining the approval of a majority of the electorate at a referendum? [28] Difficult questions may arise in this regard. Thus, in the previous case, if the consent of 90 per cent. of the electorate were required, it might be said that, *in effect*, no provision had been made for a workable transfer of power.[29]

Under the third head, the question is whether Parliament may grant power to another person or body, without intending to curtail its own powers. Cases in point are the "parent" Acts in regard

[26] The usual examples are the Unions between England and Scotland, and between Great Britain and Ireland. Thus, Anson explains these events as follows: "In the first case the Parliaments of England and Scotland, in the second the Parliaments of Great Britain and Ireland, respectively, approved of terms by which their sovereignty and their existence came to an end. Each Parliament with all its sovereign powers passed into a new body, the united Parliament of the two countries concerned." *Op. cit.*, p. 8. See also *Dicey*, *op cit.*, p. 69 *in notis*; and for fuller discussion, Dicey and Rait, *Thoughts on the Scottish Union*, pp. 19–23, and W. L. Mathieson, *Scotland and the Union*.

[27] *Op. cit.*, p. 370.

This is the sort of problem which arose for decision in *Vauxhall Estates* v. *Liverpool Corporation* [1932] 1 K.B. 733, and *Ellen Street Estates* v. *Minister of Health* [1934] 1 K.B. 590. See note 38 below.

An analogous problem arose in regard to the Union between Great Britain and Ireland. The Act of Union, 1800, provided that the government and doctrine of the United Church of England and Ireland should remain "for ever" assimilated to those of the existing Church of England. On the hypothesis (as to which, see Anson, *op. cit.*, p. 8) that the new Parliament of the United Kingdom was to enjoy *the same* powers as the Parliaments which were united in it, the question arose whether the new Parliament could be so bound "for ever." Similar questions have been asked in regard to the Union between England and Scotland.

[28] In this example there is a transfer of power, within a given legislative field, from the Queen, Lords and Commons to the Queen, Lords, Commons and the electorate, that is from three elements to four, the fourth being a new one. And in this regard, it is relevant to recall the process by which the English Constitution has developed, *viz.*, by a transfer of authority "from the Crown acting alone (or rather in council) to the Crown acting first together with, and then in subordination to, the Houses of Parliament." See Dicey, *op. cit.*, pp. 69–70, *in notis*.

Other examples, illustrating the question in the text, may be suggested. Thus, may Parliament irrevocably transfer its powers to the Queen, the Lords, or the Commons, or to any two of these? Bacon answers affirmatively. *Maxims*, *op. cit.*, pp. 370–1.

[29] *A fortiori*, a requirement of unanimity. *Cf.* Friedmann in the article cited in note 17, above. Friedmann suggests the application of a "pith and substance" test.

to delegated legislation, the setting up of colonial legislatures by Act of Parliament and, probably, the Parliament Act, 1911.[30]

What are the relevant considerations in approaching these problems? To begin with, it is submitted that they "cannot be settled by an airy reference to the 'sovereignty' of Parliament."[31] In logic, as Salmond so clearly shows, there would seem to be no limits upon the competence or freedom of a sovereign legislature to restrict its powers or change the mode of law-making.[32] But here, one feels instinctively, logic alone is not a sufficient guide. Different legal systems may well give different answers, and many considerations in addition to logic may be operative. Perhaps, as Dr. Jethro Brown suggests, the solution in English law depends on expediency[33]; or it may be, as Dicey hints, that the answer "lies deep in the history of the English people."[34]

Expediency, logic and the weight of opinion appear to favour the legal competency of a total and irrevocable transfer of sovereignty from one body to another.[35] Again, the competency of a revocable grant,[36] without curtailment of the grantor's powers, is hardly contentious. Further, both logic and expediency seem to point to the validity of a *territorial* abdication in favour of another person or body.[37] On the other hand, whatever answer may be given by logic, expediency probably does not

[30] The Parliament Act does not purport to be irrepealable by the Queen, Lords and Commons. As a matter of law, it contains a revocable grant of power, not an irrevocable divesting of power.

[31] Jennings, *Law and the Constitution*, 3rd ed., p. 148.

[32] Thus Salmond, *Jurisprudence*, 10th ed., pp. 495–6, says: "The exercise of legislative power is admittedly subject to legal *conditions*; why not, then, to legal *limitations*? If the law can regulate the *manner* of the exercise of legislative power, why not also its *matter*? As the law stands, Parliament may repeal a statute in the same session and in the same manner in which it was passed; only a majority of those voting is required to repeal it. What, then, would be the effect of a statute providing that no statute should be repealed save by an absolute majority of all the members in each House? Would it not create good law, and so prevent either itself or any other statute from being repealed save in manner so provided? What if it is provided further, that no statute shall be repealed until after 10 years from the date of its enactment? Is such a statutory provision void? And if valid, will it not be applied by the law courts so that any attempt to repeal either it or any other statute less than 10 years old will be disregarded as beyond the competence of Parliament? And if a statute can be made unrepealable for 10 years, how is it *legally impossible* that it should be made unrepealable for ever? Such a rule may be very unwise, but by what argument are we to prove that it involves a logical *absurdity*?"

[33] *The Austinian Theory of Law*, p. 164. "The Austinian position that a supreme legislature is incapable of legal limitation is a position which does not rest, as Austin supposes, upon logical necessities, but upon the humbler ground of expediency." Quoted by Salmond, *Jurisprudence*, 3rd ed., p. 480.

[34] *Law of the Constitution*, 9th ed., p. 69, *in notis*. *Cf. Trethowan's Case*, 44 C.L.R. at p. 426, *per* Sir Owen Dixon.

[35] Bacon, *op. cit.*, pp. 370–1; Dicey, *op. cit.*, p. 69; Anson, *op. cit.*, p. 8.

[36] In deciding whether a grant of power is revocable or irrevocable, difficult questions of interpretation of the enactment may first have to be considered. See note 37, below.

[37] See Anson's "first exception," above, p. 293. Anson referred to the repeal, in 1782, of the Declaratory Act (6 Geo. 1, c. 5) in regard to Ireland. It was

favour a limitation of power, without transfer to another.[38] Difficult cases arise where a sovereign Parliament attempts (a) to transfer irrevocably *part* of its powers to a new body within the *same territory*,[39] or (b) to redefine the manner in which its own elements must function in order to exercise power in all or some matters.[40] Postulating the divisibility of sovereignty in the legal sense,[41] these cases are feasible *in pure logic*.[42] But whether they are competent *in law* is another matter. In the present state of the authorities, it is submitted that one cannot prudently give a clear-cut answer; for this is where the fields of law and logic, politics and history meet and overlap; where their boundaries are fluid, elusive, and obscure.

the clear intention of the repealing Act to concede legislative independence to Ireland beyond recall, and Anson regarded this as legally effective: 2 L.Q.R. pp. 438, 439. Similarly, Dicey states that in 1782 the British Parliament surrendered its sovereignty in Ireland to the Irish Parliament. See *A Leap in the Dark* (London), 1911, p. 29.

This would not be an unreasonable interpretation of the "Westminster formula": see s. 4. Thus, van den Heever J.A., speaks of "the Imperial abdication of Great Britain," 1952(2) S.A. at p. 791. And see Evatt, *The King and His Dominion Governors*, pp. 308–9. *Cf.* Anson's views in regard to s. 39 (1) (*a*) of the Government of Ireland Bill, 2 L.Q.R. p. 439.

[38] This, in fact, is the "textbook case" dealt with by the authorities. See *Godden* v. *Hales*, 11 St.Tr. (1686), at p. 1197: "If an Act of Parliament had a clause in it that it should never be repealed, yet without question the same power that made it may repeal it," *per* Herbert C.J.; *Vauxhall Estates* v. *Liverpool Corporation* [1932] 1 K.B. 733; *Ellen Street Estates* v. *Minister of Health* [1934] 1 K.B. 590. See also Coke, 4 Inst. 42; Blackstone, *Commentaries*, Sec. 3, para. 9: "Acts of Parliament derogatory from the power of subsequent Parliaments bind not"; Bacon, *Regula* XIX.

[39] *e.g.*, by requiring a referendum for certain types of legislation.

[40] Bacon, *op. cit.*, p. 370, says that a clause in a will, purporting to prevent the testator from revoking it "except in a particular manner," is void, "even although it do restrain the revocation but in circumstance and not altogether." This is sound Roman (and probably English) law. Perozzi, for example (*Istituzioni di Diritto Romano*, 1928, Vol. II, p. 533), states the Roman rule in much the same way as Bacon. But it does not necessarily apply to the kind of *legislation mentioned in the text*; for it is essential to note carefully the reason underlying the rule. This is stated by Perozzi (*loc. cit.*) as follows: The testator cannot validly prescribe that a subsequent (revoking) will shall be inoperative unless executed in accordance with certain formalities (which differ from those laid down by law), because the law alone determines the formalities for the due execution of wills. *Sulle forme dei testamenti dispone soltanto la legge*. In other words, it is the *law*, and not any inherent logic, *which determines the conditions under which a will may be revoked by a later will.*

The question of the competence of the Union Parliament to prescribe a new and binding manner of law-making, may arise in connection with Act 12 of 1936, which, in terms, extends the two-thirds majority provisions of the Constitution to a new field, namely, Cape *Native* Voters' rights and the number of Native Representatives in the House of Assembly. See s. 44; and cf. s. 27 which was considered in *R.* v. *Vezi*, 1947(4) S.A. 551. It may also arise in connection with s. 1 of Act 45 of 1934 (inserted as s. 149 of the South Africa Act), which provides that Parliament shall not alter provincial boundaries nor abolish provincial councils except on petition by the provincial councils concerned.

[41] See note 77, above.

[42] Salmond, note 32 above.

THE SOVEREIGN WILL OF THE PEOPLE

One last argument remains to be considered. It has been contended that the binding effect of the entrenched sections thwarts the "sovereign will of the people," and is incompatible with democratic government. What sort of democracy exists, it is asked, if a decision by a majority in Parliament is not allowed to prevail? This question is hardly suitable for discussion in a law journal, but it may not be inappropriate to venture three brief observations which tend to be overlooked.

First, it is necessary to distinguish between a majority of the electorate[43] and a majority of Members of Parliament; for a majority returned to Parliament may represent a minority of voters.[44] Secondly, it is only by virtue of the provisions of the constitution that the South African "people" have any legally operative will at all. As Professor K. C. Wheare has pointed out, "once a Constitution is enacted, even when it has been submitted to the people for approval, it binds thereafter not only the institutions which it establishes, but also the people itself. They may amend the Constitution, if at all, only by the methods which the Constitution itself provides."[45] Finally, it is essential not to lose sight of the pragmatic foundation upon which the "majority principle" rests.[46] There is nothing self-evident or sacrosanct about the technique of reaching a decision by a bare majority of 51 per cent. The framers of constitutions in democratic countries might quite reasonably prefer 66 per cent.—as for the amendment of the entrenched sections[47]—or even 75 per cent., as for the amendment of the constitution of the old Free State Republic.[48]

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[43] Which, of course, is not the same as a majority of "the people."

[44] Proportional representation does not apply to South African Parliamentary elections. The Constitution also contains provisions for weighting constituencies in favour of the rural areas.

[45] *Modern Constitutions*, pp. 88–90.

[46] See, generally, on the "majority principle," Otto Gierke, "Uber die Geschichte des Majoritätsprinzips," in *Essays in Legal History*, Oxford, 1913, p. 312; O. Prausnitz, "Representation and the Majority Principle," in 1934 *Politica*, p. 215; Kranenburg, *Political Theory*, Oxford, 1939, pp. 151 *et seq.*; Haskins, *The Growth of English Representative Government*, 1948, pp. 31 *et seq.*; Ruffini Avondo, *Il Principio Maggioritario*, 1927.

[47] On a number of questions a two-thirds vote is needed under the United States Constitution. See Art. 5; Art. 1, sec. 5, cl. 2; Art. 1, sec. 7, cl. 2; Art. 2, sec. 2, cl. 2; Art. 1, sec. 3, cl. 6. See also Art. 76 of the Weimar Constitution, and s. 29 (4) of the Ceylon Constitution.

[48] Art. 26.

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THE UNDISCLOSED PRINCIPAL*

A. The Problem Stated

"A PROPHET is not without honour, save in his own country"—this biblical truth is nowadays again illustrated in the field of legal institutions by "undisclosed agency." While Germany and France are admiring it more and more, it is losing favour in its own mother country and in the U. S. A.

The present appreciation of undisclosed agency in England is well known. No decision and no textbook omits to call it expressly "an anomaly in the law of contracts," out of harmony with basic legal principles. Lord Lindley stated in *Keighley, Maxsted & Co.* v. *Durant* [1] "there is an anomaly in holding one person bound to another of whom he knows nothing and with whom he did not intend to contract." Likewise the general attitude of textbook writers [2] is expressed by Cheshire and Fifoot [3]: "The doctrine of the undisclosed principal is anomalous in the sense that it allows a person to sue and to be sued upon a contract that he has not in fact made." In particular Sir Frederick Pollock [4] has repeated several times that "the plain truth ought never to be forgotten—that the whole law as to the rights and liabilities of an undisclosed principal is inconsistent with the elementary doctrines of the law of contract. The right of one person to sue another on a contract not really made with the person suing is unknown to every other legal system except that of England and America." Oliver Wendell Holmes,[5] has assumed "that common sense is opposed to allowing a stranger to my overt acts and to my intentions, a man of whom I have never heard, to set up a contract against me which I had supposed I was making with my personal friend" and James Barr Ames [6] has added that whenever an established doctrine ignores, as this doctrine of the undisclosed principal ignores, fundamental legal

* This article was written during my stay as a visiting professor at the London School of Economics and Political Science during the academic year of 1951–52. I must express my sincere appreciation of the assistance given by my colleagues in the Law Department. See also my article: "Die 'Anomalie' der verdeckten Stellvertretung des englischen Rechts" in Rabel's *Zeitschrift*, 1952 part 4, 1953 part 1.

1 [1901] A.C. 240.

2 Street, *Foundations of Legal Liability*, II, 478; Goodhart and Hamson, 1932, 4 Camb.L.J. 320; *Huffcut on Agency*, 2nd ed., p. 158; *Salmond and Williams*, 2nd ed., p. 409; Williston, *A Treatise on the Law of Contracts*, 1936, pp. 278, 809.

3 *Law of Contract*, 2nd ed., p. 353.

4 3 L.Q.R. p. 359; 14 L.Q.R. p. 5.

5 "The History of Agency" in *Select Essays in Anglo-American Legal History*, Vol. 6, p. 404.

6 18 Yale Law Journal 443 (1909).

principles, "it is highly important that it should be recognised as an anomaly."

On the other hand, Continental jurisprudence esteems the institution of undisclosed agency very highly. French lawyers [6a] consider it "une institution essentiellement pratique, efficace, qui est tout entier dirigé vers les solutions les plus favorables au crédit commercial." Lévy-Ullmann [7] acknowledges it as an "original institution" and Popesco-Ramniceano [8] sees in it the key for the understanding of the agency problem "qui a fait couler tant d'encre sur notre vieux continent." German lawyers, moreover, look on it as an institution which may well serve as a model for the development of the law. They expressly emphasise that "it is no anomaly," "nicht als regelwidrig erscheint, sondern im Gegenteil in feinsinniger Weise der jeweiligen Interessenlage angepasst ist." Therefore they consider it a highly valuable institution of great practical application, which represents in several respects the type "to which the modern German doctrine gradually tends after having discovered the inadequacies of the present solution." [9] In this way, the institution of "undisclosed agency" plays the rôle of a prophet offering a solution of urgent problems of our day.

This view is supported by the fact that the idea behind all these arguments is the attempt to fit the model of contract developed under the reign of Roman law into the various aspects of modern social life. The social function of contract at the present day requires the extension of the contractual "vinculum juris." The individual two-party relationship must be transformed into a multi-party relationship, and here, undisclosed agency makes a highly valuable contribution. For it allows a third party not only to sue the agent and be sued by the agent who has acted in his own name, but also to sue and be sued by the undisclosed principal himself who stands behind the scene. It is the undisclosed principal who gets the advantages and disadvantages of the contract in the end. He is the one who authorised the agent and thereby induced the whole transaction, although he was not mentioned in the contract. Therefore he is not in the position of a complete stranger to the contract like every other person—as it is maintained by those who rely upon the "meeting of the mind theories,"

[6a] Jambu-Merlin, in Hamel, *Le contrat de commission*, Paris 1949, p. 326.

[7] "La contribution essentielle du droit anglais à la théorie générale de la représentation dans les actes juridiques" in *Acta academiae universalis jurisprudentiae comparativae*, Vol. 1, 1928, p. 341.

[8] Popesco-Ramniceano, *De la représentation dans les actes juridiques*, Paris 1927.

[9] Würdinger, *Geschichte der Stellvertretung (agency) in England*, Marburg 1933, pp. 412, 422, 444. In similar sense R. Müller-Erzbach, *Die Grundsätze der mittelbaren Stellvertretung aus der Interessenlage entwickelt*, Berlin 1905, p. 56; Klausing in *Rechtsvergleichendes Handwörterbuch*, Vol. 3, pp. 379, 398; Ruhl, *Eigentumsvorbehalt und Abzahlungsgeschäft*, pp. 48 *et seq.*; something more reserved Schmidt-Rimpler in *Ehrenberg's Handbuch* V, II, 1, p. 604 and Rabel's *Zeitschrift* 1937, p. 748 *et seq.* Dölle *Festschrift Fritz Schulz* 1951, p. 277.

"theories of objective manifestations" and so forth. True, the agent has acted in his own name, so that the third party finds himself unexpectedly bound to a creditor whose existence he did not suspect when contracting. Undoubtedly no theory of contract based on the liberal idea of mutual assent can explain how the third party can make a contract with a person of whose existence he does not even know. But is it a conceptual necessity in any case that a person acting in his own name can bind and entitle only himself personally? Is not the real problem of the law of contracts to settle the various mutual interests in the most fair, reasonable, simple and speedy way, without laying an unjust burden upon one party? Why separate one coherent transaction into two different incidents instead of avoiding duplication and circuity of actions? Legal rights and obligations are acquired in the first instance through exercise of the will not of the parties but of legal officials.[10] Viewed in this light there is no obstacle to an undisclosed principal suing and being sued by the third party.

However, it is remarkable that it is the English common law which reached this solution of creating direct relationship between an undisclosed principal and the third party. For English common law insists so strongly, by its principle of "privity of contract," upon the limitation of the contractual effects to the contracting parties. Moreover it attaches no less value than continental systems to the rule that "no one but the parties to a contract can be bound by it." It goes even further by saying that a third person cannot become entitled, by the contract itself, to demand the performance of any duty under the contract.[11] On the contrary "ce principe est beaucoup plus absolu et plus strict dans ces conséquences en droit anglais que dans d'autres législations."[12]

English law still clings to the principle which was formulated by Cotton L.J. in *Re d'Angibau*[13] following *Colyear* v. *Mulgrave*:[14] "The Court will not enforce a contract, as distinguished from a trust, at the instance of persons not parties to the contract." It is in this sense that Lawson[15] speaks about the English Law of Contract; "it seems that we take more seriously than the French the famous provision contained in Article 1134 of their Civil Code: 'Les conventions légalement formées tiennent lieu de lui à ceux qui les ont faites.' . . . We think of the contract . . . that it operates only between the parties." Arminjon, Nolde, Wolff argue that "this is expressed especially in the English rules concerning joint contracts, assignment of obligations and in the most notorious doctrine of contract law which stipulates that no person, who is not a party

[10] K. N. Llewellyn "Agency" in *Encyclopaedia of the Social Sciences*, Vol. 1, p. 484.
[11] Corbin, "Contracts for the Benefit of Third Persons," 46 L.Q.R. 12.
[12] Arminjon, Nolde, Wolff, *Traité de droit comparé*, Vol. 3, p. 121.
[13] (1880) 15 Ch.D. 242.
[14] (1836) 2 Keen 81.
[15] *The Rational Strength of English Law*, 1951, pp. 56–7

to a contract, can sue on it." [16] In English law the parties to a contract are on principle prevented from conferring rights upon third parties, whereby "the common law of England has enunciated this doctrine in the most downright fashion." [17]

Furthermore English law has no parallel to the "action directe" in France. It does not entitle the buyer to recover his damages for breach of warranty directly from the person who has supplied the goods to his seller, nor the injured person to claim directly against the tortfeasor's insurance company.[18] What is the explanation of the fact that while on the one hand there is this obvious resistance to any attempt to widen the number of the participants to a contract, on the other hand English common law allows the undisclosed principal to sue and be sued by the third party?

For the English courts have found no difficulty in giving directly the undisclosed principal rights and imposing on him liabilities. Generally they did not worry about the difference between the legal effects imputed and the contents of the declarations of the parties. They were satisfied with the simple statement that the agent was the "apparent" and "nominal" contractor and the undisclosed principal the "real" one.[19] For they said that, although the contract is *in fact* made by the agent it is *in law* [20] "really," [21] "in effect" "in truth although not in form" [22] that of the undisclosed principal. In 1785, Lord Mansfield confined himself to the sole remark that the rules of the undisclosed agency "are long settled," [23] although there is no clear reported case of an undisclosed principal before the eighteenth century. Moreover the case of *Scrimshire* v. *Alderton*,[24] which is generally quoted as the first one in which the rights of an undisclosed principal were discussed, forms on the contrary a most characteristic illustration of the reluctance of the laymen to accept the new doctrine. The facts of this case were: A farmer had consigned oats to a factor for sale on a del credere commission. The factor becoming insolvent, the principal gave notice to the buyer not to pay the factor, but notwithstanding this notice the buyer paid the factor and was sued by the farmer. Lee L.J. directed the jury to find for the plaintiff but they returned a verdict for the defendant. They were sent out three times to reconsider their decision, but always adhered to their verdict. There was a new

[16] *Traité de droit comparé*, Vol. 3, p. 121.
[17] Lawson, *Rational Strength*, p. 43.
[18] *Bennett Ltd.* v. *Kreeger* (1925) 41 T.L.R. 609; *Randall* v. *Raper* (1858) E.B. & E. 84.
[19] *Sims* v. *Bond* (1833) 5 B. & Ad. 389; *Keighley, Maxsted & Co.* v. *Durrant* [1901] A.C. 240.
[20] *Cothay* v. *Fennell* (1830) 8 L.J.K.B. 302; *Higgins* v. *Senior* (1841) 8 M. & W. 834.
[21] *Pope* v. *Meadow Springs Distilling Co.* (1884) 20 Fed.Rep. 35.
[22] Lord Lindley in *Keighley, Maxsted* v. *Durrant* [1901] A.C. 261.
[23] *Rabone* v. *Williams* (1785) 7 T.R. 360.
[24] (1743) 2 Str. 1182.

trial and again the jury gave a verdict for the defendant, in spite of the statement by the Lord Chief Justice that "a factor's sale does by the general rule of law create a contract between the owner and buyer." Lord Chorley [25] writing in 1929, rightly calls the jury's verdict "an outrage to legal theory."

But these words by Lord Mansfield have again become an object of legal consideration in the recent decision in *Smith & Snipes Hall Farm, Ltd.* v. *River Douglas Catchment Board* [26] where Denning L.J. stated that the principle that no one can sue upon a contract to which he is not a party has never been able entirely to supplant the principle "that a man who makes a deliberate promise which is intended to be binding, that is to say under seal or for good consideration, must keep his promise; and the court will hold him to it, not only at the suit of the party who gave the consideration, but also at the suit of one who was not a party to the contract, provided that it was made for his benefit and that he has a sufficient interest to entitle him to enforce it; subject always, of course, to any defences that may be open on the merits. *It is upon this principle, implicit if not expressed . . . that Lord Mansfield held that an undisclosed principal is entitled to sue on a contract made by his agent for his benefit, even though nothing was said about agency in the contract.*"

By these words Denning L.J. puts his finger on the central problem. The gist of the matter is to find an explanation of why an undisclosed principal can sue or be sued by the third party. According to him the same justification applies to contracts in favour of third persons as to the right of an undisclosed principal to sue the third party. This line of reasoning is merely a re-expression of the old Scandinavian löfte-theory, that the unilateral offer has a binding force in both sets of circumstances. But "English law knows nothing of a *jus quaesitum tertio* arising by way of contract." [27] Consequently English law cannot point to contracts for the benefit of third parties to justify undisclosed agency; the two conceptions contradict rather than support each other.

B. Explanation on the basis of the English concept of contract

1. *Contracts under seal*

Since there are two entirely different forms of contract in English law, *viz.*, contracts under seal and parol,[28] the analysis must take account of this difference. In the light of the statement of Denning L.J. mentioned above, one might expect that it would be in contracts under seal that undisclosed agency would find its first and

[25] 45 L.Q.R. 225.
[26] [1949] 2 K.B. 500 at pp. 514–5.
[27] Lord Haldane in *Dunlop Pneumatic Tyre Co. Ltd.*, v. *Selfridge & Co. Ltd.* [1915] A.C. 847.
[28] Skynner L.C.B., in *Rann* v. *Hughes* (1778) 7 T.R. 350.

easiest application. For such contracts are not consensual to the same degree as simple contracts. The rights and duties under a contract by deed do not necessarily arise from the mutual consent of the parties, for the law as to obligations under seal was fixed in days before the nature of the consensual contract was realised.[29] A deed, when it is directed to the creation of contractual obligations, operates immediately upon the signification of assent by the party to be bound, and does not require the consent of the other party to enable it to operate. It operates upon the party immediately he executes it even though its existence may be unknown to the party to benefit under it.[30] It is for this reason that no acceptance by the donee is necessary to validate a gift under seal in English law—in contrast to continental laws (Article 894 *et seq.* Code Civil, §§ 516 *et seq.* B.G.B.).

This absence of any necessity for agreement in a contract under seal has been described [31] as a " regrettable anomaly "; likewise the undisclosed agency is described as an " anomaly " because of the lack of agreement between the third party and the undisclosed principal.

From this common anomaly one might think that undisclosed agency would fit especially well into the law of contracts by deed. But the contrary is the case. It is an old and well-known rule of law that an undisclosed principal is not able to sue or to be sued if the contract is under seal. Why is it not possible in these cases to put him in direct relationship with the third party?

The explanation is given by the concept of " consideration." Consideration marks the connection between the undisclosed principal and the third party. But the presence of " consideration " is only an essential requirement in the law of simple contracts. It plays no rôle at all in the law of contracts by deed. These contracts do not require a " valuable consideration " as " a cardinal necessity of the formation of a contract." [32] As ancient examples of formal contract, they stay completely outside the newer family of contracts, which is characterised by the presence of consideration. On the contrary, their force depends entirely upon the delivery of a suitable piece of parchment and wax.[33] Therefore the usual statement " every deed imparts in itself a consideration " [34] is in reality nothing else than a different way of putting the rule that deeds under seal have nothing to do with the common law requirement of consideration.

The consequence of this non-recognition of the principle of consideration in formal contracts had to be the non-recognition of the

[29] Lord Wright in *Naas* v. *Westminster Bank* [1940] A.C. 366, 403.
[30] *Fletcher* v. *Fletcher* (1844) 4 Hare 67, *Re Kay's Settlement* [1939] Ch. 329.
[31] T. E. Holland, *Jurisprudence*, 13th ed., p. 281. Anson, *Principles of English Law of Contract*, 18th ed., p. 33.
[32] Denning L.J. in *Combe* v. *Combe* [1951] 2 K.B. 215, 220.
[33] Plucknett, *A Concise History of the Common Law*, 4th ed., 1948, p. 614.
[34] *Sharington* v. *Strotton* (1565), 1 Plowden 298, 309; 75 E.R. 454, 470.

undisclosed agency. It is therefore not an inexplicable anomaly, but an inevitable and consequential result, that there is no direct relationship between an undisclosed principal and the third party in the law of deeds, because the necessary connecting-link is missing.

2. *Simple contracts*

But in the sphere of simple contracts the doctrine of consideration plays now as in the past the role of one of the most characteristic elements of English law. Since the seventeenth century, it has been applied to contract as a general and comprehensive principle,[35] with the result, according to the statements of the Law Revision Committee issued in 1937, "that no doctrine of the common law of England is more firmly established at the present day than the doctrine of consideration."

It originated as an element in the mechanism of the old Forms of Actions. Its sources were the action of debt and the action of assumpsit. From the action of debt was derived the idea of real contract, the requirement of a benefit to the defendant. The debt was "not an action upon an agreement, but from a *quid pro quo*."[36]

The action of assumpit contributed the emphasis upon the loss caused to the promisee by the promisor's failure to perform; it was an action based on an undertaking of the defendant. Therefore the consideration, consisting of some act given by the promisee in return or exchange for that of the promisor had as consequence the rule that it had to move from the promisee.[37] It could not proceed from a stranger to the consideration. "Hence we find the all-important rule of privity of contract: No stranger to the consideration can sue upon a contract."[38]

The main practical importance of this doctrine of consideration is, "that it has always proved an insuperable obstacle to the enforcement of the *stipulatio alteri*."[39] The third person has given no consideration; consequently he cannot, from the contract of the two parties, obtain the right to sue directly.[40] He is a stranger to the contract, for he has not himself furnished consideration.

On the other hand, the idea that mutual assent forms the basis of contract is no obstacle to the acquirement of rights by third parties. The doctrine that contractual obligations are self imposed only signifies that one individual cannot be bound by the intentions of another, but does not assert that one individual cannot give

[35] Cheshire and Fifoot, *Law of Contract*, 3rd ed., p. 16.
[36] Holdsworth *H. E. L.* Vol. 8, p. 11 *et seq.*; Denning L.J. in 41 L.Q.R. 79; Plucknett, p. 598.
[37] Lord Denman in *Price* v. *Easton* (1833) 4 B. & Ad. 433; Patteson J. in *Thomas* v. *Thomas* (1842) 2 Q.B. 851.
[38] Stephen, *Commentaries on the Law of England*, 19th ed., Vol. 3, p. 59.
[39] Beinart, (1940) 4 M.L.R. 154, Arminjon, Nolde, Wolff, *Droit Comparé*, Vol. 3, p. 121.
[40] *e.g.* Blackburn J. in *Tweddle* v. *Atkinson* (1861) 1 B. & S. 393; 30 L.J.Q.B. 265.

rights to another. Moreover, the idea of mutual assent is preserved either by the rule that the third party must accept his right (French doctrine) or by the rule that the third party has a right of reprobating the accrued rights with retrospective effect (German and Scandinavian laws). In this way, the question of admission of contracts in favour of third persons represents the cross-road, where the principle of private autonomy leads to results different from these flowing from the principle of consideration.

English law has decided this question in favour of the doctrine of consideration. It does not admit, on principle, contracts in favour of a third person because of the lack of consideration on his part, thus demonstrating that it considers the principle of consideration superior to those of private intentions and consensus.

It is this attitude which also explains the institution of "undisclosed agency." Here the situation is the reverse of the legal position of persons connected by a contract in favour of third persons. While consideration is not essential in order to establish relationship of principal and agent, it is the essential link in the relationship between the undisclosed principal and the third party.[41] In the normal case of an agent acting in the interest of his principal, the principal is the man who pays the money and receives the benefit: the person who ultimately bears the burden of the detriment, which is the consideration moving to the third party. Neither a doctrine of the "meeting of the minds" nor any "theory of objective manifestations" can reach this result. These doctrines, based on the declared intentions of the parties to the action, can never explain the rights and liabilities of the undisclosed principal without the intervention of the agent acting in his own name. They lead always to his interposition in the contract, whereby the undisclosed principal is excluded. They are not only unable to explain the connection of the third party with the undisclosed principal, but are also opposed to this result. This is made plain by a comparison of the contract in favour of third persons with undisclosed agency. The contract in favour of third persons is a special category of executed contract, for the stranger is here affected by the legal effects of the concluded agreement, while undisclosed agency is a special category of the formulation of a contract, where the stranger is the person who concludes the contract. The counterpart to the stipulation in favour of third persons is the stipulation which affects only the promisor and the promisee; the opposite to the contract made by an agent is the contract made by the party himself, in which the question whether the effects of the contract are to his detriment or in his favour is quite irrelevant.

In a contract of undisclosed agency the consideration moves from the undisclosed principal to the third party, *i.e.*, the agent is the stranger to the contract, a mere conduit pipe, whereas in a

[41] *Dunlop* v. *Selfridge* [1915] A.C. 847.

contract in favour of a third party the requirement of consideration to the "stranger," the third party, is not fulfilled. For this reason it is submitted, with respect, that the opinion of Denning L.J. in *Smith & Snipes Hall Farm, Ltd.* v. *River Douglas Catchment Board*,[42] namely that the basis of the undisclosed principal's right to sue is the principle that a man who makes a deliberate promise which is intended to be binding must keep his promise, is not a correct explanation.

However, it is true that the idea of keeping a man to his promise also supports the institution of undisclosed agency. It is not only the fact that the principal has got an objective enrichment which justifies his direct liability to the third party—corresponding to the action of debt. He has also consented. The undisclosed principal is responsible directly to the third party because he has authorised the agent. He has enabled him to act as his agent and so made him competent to exercise his rights and duties. In Continental laws this question creates a special difficulty, for since the publication of the famous article by Laband[43] they clearly distinguish the external grant of powers to represent the principal from the internal basic contract of mandate.[44] For them a contract of agency presumes that the agent has to act in the name of his principal; otherwise there is no authority given to the agent to bind or to give rights immediately to his principal. But English law has never accepted this doctrine "which contradicts English legal thinking in its subtlety."[45] Nevertheless, that is not the main reason for the existence of the undisclosed agency. It does not explain why the *third party* enters into direct relationship with the undisclosed principal, in spite of the fact that the agent acts *vis-à-vis* the third person in his own name.

This explanation, that consideration is the basis of the undisclosed agency, is furthermore supported by the fact that there is no undisclosed agency in the law of property. The power to act for an undisclosed principal with the result that the principal

[42] [1949] 2 K.B. 500, at pp. 514–5.

[43] "Die Stellvertretung bei dem Abschluss von Rechtsgeschäften nach dem allgem. Deutsch. Handelsgesetzbuch" in *Zeitschrift für das gesamte Handelsrecht*, 1866, Vol. 10, p. 186.

[44] German Civil Code, ss. 164 *et seq.*; Swiss C. Obl.arts. 32–40, Poland C.Obl. arts. 93 pp.; Italian C. C. arts. 1387–1400 etc. The French Civil Code, dating from an earlier time, does not yet follow the distinction, but the leading French writers (*e.g.*, I *Colin et Capitant* 88, *cf.* 2 *ibid.* 704–6; Esmein in *Planiol et Ripert*, 6 *Traité Pratique* 72 s. 55) have adopted it. See also Lewis J. in *Sinfra AG.* v. *Sinfra, Ltd.* [1939] 2 All E.R. 675, 682. The dualism is still to be found, *e.g.*, in Cheshire and Fifoot, *The Law of Contracts*, 2nd ed., p. 336, where agency and authority are only described as "the two aspects of the contract of agency."

[45] Schmidt-Rimpler in *Ehrenberg's Handbuch*, Vol. 5, II 1, p. 921 note 21. Therefore Rabel, *The Conflict of Laws*, Vol. 3, p. 129 points out, that authorisation must be understood in a double sense: "the one for civil law consisting in the agent's power to act in the name of the person represented; and the other for common law consisting in the agent's permission to act either in the principal's name or as an undisclosed agent, or both."

directly acquires rights from the third person exists only in the law of contracts. But the law of contracts in contrast to the law of property is also the sphere of application for the doctrine of consideration. The surprising fact that an undisclosed agency is only possible in the law of contracts is thus simply explained. This is specially worth noting because the efforts made on the Continent to establish a direct legal relationship between an undisclosed principal and the third party are especially concerned with the property. There, in the field of transfer of property, it is felt especially necessary to make it possible for a principal to acquire rights directly from the third party. For example, when a man has given his maid money to buy rolls, and the maid does not mention in the bakery that she is not acting on her own behalf, Continental lawyers try to help by a transaction "for whom the matter concerns."[46] English law can instead fall back on the institution of the trust, according to which the agent has the legal title as a trustee, while the undisclosed principal retains the equitable ownership. J. B. Ames has transferred the concept of the trust into the law of contracts as a rationalisation of undisclosed agency, because he did not realise the importance of the doctrine of consideration.[47] He pointed out that "the undisclosed principal as *cestui que trust* would realise indirectly through the trustee all that under the actual law he now obtains from him by a direct action against him. The third person would have the same defences against the trustee suing for the principal, his *cestui que trust*, which he now has against the principal suing in his own name." But this solution would be a much more roundabout way of recognising the rights and liabilities of an undisclosed principal than the present simple doctrine based on the principle of consideration, which avoids all circuity of action. Moreover, the doctrine of consideration explains fully the connection between an undisclosed principal and a third party, so that it is unnecessary to use the possibilities of trust.

The coherence of undisclosed agency and the doctrine of consideration is also confirmed by the historical development. It is no coincidence that the principle of consideration was finally settled at the end of the seventeenth century, and that there is no clear case of an undisclosed principal before the eighteenth century. The main reason is that the old contractual remedies which the plaintiff had to use at this time did not require mutual assent. The form of action was the test, and an action on a contract was not necessarily synonymous with an action on an agreement.[48]

[46] *e.g.*, Cohn, *Das rechtsgeschäftliche Handeln für denjenigen, den es angeht*, Marburg, 1931.

[47] "Undisclosed Principal—his rights and liabilities," (1909) 18 *Yale Law Journal* 443, reprinted in *Lectures on Legal History*, 1913.

[48] For a further modern relic of an old action of an executed contract which "was not an action on the agreement but an action on the debt" see Denning L.J. "Quantum Meruit and the Statute of Frauds," 41 L.Q.R. 79.

But every action on a contract demanded the existence of consideration. No claim could be started without making reference to the presence of consideration. The necessary preamble consisted in the phrase: "In consideration that. . . ." Consequently no third party could claim, after the disclosure of the agency, without mentioning the principal who had given the consideration. The existence of the undisclosed agency is therefore an additional proof of the truth of Maitland's words "the forms of actions still rule us from their graves." [49]

The development of the undisclosed agency from the principle of consideration is further supported by the connection of a principal's liability for torts committed by his agent with the idea of agency, a connection which is not to be found on the Continent. The Continental lawyer treats these questions as two quite different problems, which are not only separated systematically but which have been given two quite different practical solutions (*e.g.*, section 831 B.G.B. and section 31 B.G.B.). But the English system applies in both instances the rule *qui facit per alium facit per se*, which demonstrates the source of both claims in the old action of assumpsit. It would therefore have been quite extraordinary if the idea of consideration, which is so closely connected with the action of assumpsit, had not left its traces on the law of agency, in so far as the legal effects are concerned.

Finally this explanation of the doctrine of the undisclosed principal from the principle of consideration fits perfectly well into the structure of the law of contract as it has been developed empirically by the courts. As judge-made law, the English law of contracts was from the beginning not so exposed as were the codified Continental laws to the danger of connecting one special legal effect with certain ingredients in every case. It could more easily investigate and safeguard the different interests in varying circumstances. These interests are especially complicated and interrelated in the law of agency because of the threefold relationship, corresponding with the three persons involved. On account of its practical nature it was much more interested in the result as such than in any systematical method of reaching that result. The English Law of Contract is based on an economic transaction, so that "the typical contract in the common law may be defined as an obligation arising from a bargain." [50] English law has preserved this commercial slant particularly because of the reception of the Law Merchant by the Common Law, through which at first the ideas of undisclosed agency were mainly developed. Clearly such an approach was bound to recognise, in a situation as important in commercial life as undisclosed agency, the requirement of consideration—"which treats all simple contracts as resting primarily on the basis of bargain." [50] It

[49] *Forms of Action at Common Law*, (ed. 1941) p. 2.
[50] Ballantine in *Selected Readings on the Law of Contract*, ed. by the Association of American Law Schools, pp. 589 *et seq.*

is no mere chance that German law too, which does not adopt the idea of direct relationship between an undisclosed principal and the third party, has nevertheless taken in its commercial code (section 392 II) several steps in the direction of this solution.

It is evident, too, that an English judge of the eighteenth century preferred following the doctrine of consideration rather than that of the intentions of the parties, because of its objective and practical character. "Motive is not the same thing as consideration."[51] Behind the expression "consideration" was the judicial appreciation of what would be the best way to realise the *justum, aequum, bonum*. The argument that the undisclosed principal could not be bound by the *vinculum juris*, although this was required by practical needs and the economic situation, because he was not mentioned in the contract by his agent, would not have convinced the judge. The intentions of the parties, which could constitute the only bar to this, have never played such an important role in England as on the Continent. Roscoe Pound[52] has even stated that in contrast to the Roman law, which deduced all things from the will of the actor, the central idea of the common law is a relationship. But this contrast is not based on a clear antithesis. The law may take the intentions of the parties into consideration, or it may not do so. If it does not, it must look for another standard to decide what legal effects follow. The phrase "the relation of the parties" gives no answer at all on this point, for it says nothing about the origin of this relation, and that is the crucial question.

However, it is true that the intentions of the parties do not play in the English law of contract such an important role as the Continental adherent of the doctrine of real intention would expect. English law takes an objective view. But this does not mean, as Lévy-Ullmann has suggested,[53] that it abstracts the contract completely from the personalities of the contracting parties and regards it merely as establishing a relationship between two groups of assets —the basis on which Lévy-Ullmann has founded his compilation of the undisclosed agency as *une modalité de l'acte de l'agent*.[54]

[51] Patteson J. in *Thomas* v. *Thomas* (1842) 2 Q.B. 851.

[52] *The Spirit of the Common Law*, pp. 21 *et seq.*: "Thus in agency, the civilian thinks of an act, a manifestation of the will, whereby one person confers a power of representation upon another, and of a legal giving effect to the will of him who confers it. Accordingly he talks of the contract of mandate. The common law lawyer, on the other hand, thinks of the relation of principal and agent and of powers, rights, duties and liabilities, not as willed by the parties, but as incident to and involved in the relation of principal and agent."

[53] "La contribution essentielle du droit anglais à la théorie générale de la représentation dans les actes juridiques" in *Acta academiae universalis jurisprudentiae comparativae*, Vol. 1, p. 347.

[54] According to Lévy-Ullmann the concept of agency has been developed from "l'application la plus large et la plus éclairée du principe de l'autonomie de la volonté" into "une modalité de l'acte de l'agent," like the concept of contract which has been changed from a subjective "rapport entre les personnes" into the objective "lien entre deux patrimoines." In the case of an undisclosed principal "un rapport a été établi, objectivement, par l'intermédiare de

The objective conception of contract in English law means, on the contrary, that an English court is not especially concerned in the first instance with the actual intentions of the parties. It interprets the contract as though it had an objective existence.[55] This objective conception of contract in English law also results from the idea of consideration.

The doctrine of consideration furthermore explains the fact that it was not until the end of the eighteenth and the beginning of the nineteenth century that the theory of contract involved as a necessary element actual mental assent.[56] Only then was the process of rationalisation carried through, and the judges were forced to think out the justification of legal acts. The influence of civil code jurisprudence was then felt in England. In the earliest stage it was mainly Pothier whose influence prevailed; his Treatise on Obligations was published in 1761 and translated into English in 1806 by W. M. Evans. Later on there occurred profound alterations in economic standards and the social structure, as well as the development of modern commercial ideas and needs. Legal writers influenced by Roman law explored new paths in their search for an up-to-date solution of the problems which then arose, so that the influence of the German Romanists, primarily F. C. von Savigny, was felt, especially during the period of 1830–70. But such a stage of development was not yet reached at the time when the doctrine of undisclosed agency was formulated. At that period the idea had not been evolved that the creation of contractual rights and duties arose only from the deliberate consensus of the parties.[57] Undisclosed agency was developed under a doctrine of contract which was not approved by later writers such as Pollock, Anson, and Holland. However, this does not mean that their theory of contract was the only correct one, although they thought it was, and for this reason called the fact that a contract under seal needs no consent of the other party "a regrettable anomaly."[58] Salmond and Williams write of the attempts to import ideas of consensus into the law of deeds, that: "The attitude of these writers seems to a large extent due to an attempt to force contract in English law into the straitjacket of the analysis which Continental writers, notably Savigny, have made of contract as it appears in the later Roman law and Continental codes based upon that law."[59] Their rebuke would be

l'agent, entre le principal et un tiers. Le rapport entre le principal et le tiers existe alors même que le tiers a ignoré que l'agent agissait, non pour lui-même, mais pour le compte d'un principal non révélé; son existence objective suffit pour que le droit soit né patrimonialement, activement et passivement, abstraction faite de la connaisance de cause du tiers, dans la limite où le droit positif consacre cette existence" (p. 369).

[55] Lawson, *Rational Strength*, p. 57.

[56] Williston, *Mutual Assent*, pp. 119–20; Graveson (1941) 4 M.L.R. 261.

[57] Another relic of this time is the case of a quantum meruit, which is a claim from a debt rather than on an agreement. See Denning L.J. in 41 L.Q.R. p. 79.

[58] Holland, *Jurisprudence*, 13th ed., p. 281; Anson, *Contract*, 18th ed., p. 33.

[59] *On Contracts*, 2nd ed . p. 18.

equally applicable to the common criticism of the law of undisclosed agency. But the same writers [60] themselves call undisclosed agency an anomaly.

It is worth noting also that other systems of laws which required consideration have established a direct relation between the third party and the undisclosed principal. One example is the Neo-Babylonian cuneiform law, according to which an undisclosed principal immediately gained ownership of everything his agent had bought in his own name [61] with the principal's money. Two documents analysed by M. San Nicolo [62] show this clearly. In one of them it is said that an agent had bought land for a lady without having mentioned his relationship to her, but that, as she subsequently stated expressly, the contract was concluded at her request and the price paid with her money and she obtained the land. Another example is afforded by the old Jewish law. Marcus Cohn [63] has stated that according to the law of the Babylonian Talmud, which had not yet accepted the principle of consensus, an agent acting in his own name could nevertheless acquire rights directly for his undisclosed principal. The principal's authorisation of the agent, the giving of consideration and the agent's intention to act for the principal, were sufficient legal justifications for the immediate effect on the principal, and it was irrelevant whether the agent expressed his intention to act for the principal. Here too, according to Marcus Cohn, "war die unmittelbare Wirkung der aus der Vertreterhandlung sich ergebenden Rechte in der Person des Vertretenen . . . nicht an die Voraussetzung gebunden, dass der Vertreter dem Dritten davon Kenntnis gegeben hat, dass er nicht im eigenen Namen, sondern im Namen des Vertretenen gehandelt hat."

C. The anomalies in the development of undisclosed agency originating in the lack of underlying general principle

As pointed out, in spite of the binding force of precedents, the underlying justification of contractual liability changed. This was bound to lead to internal tensions, which appeared in several decisions, especially in the course of the second half of the nineteenth and the beginning of the twentieth century.

The judgment of Blackburn J. in *Armstrong* v. *Stokes* [64] is one of the first examples. It shows the court moving away from the old basis of undisclosed agency, although it was forced by precedents to pay attention to it. Doubts about the doctrine may be read between the following lines of Blackburn J.'s judgment: "It is,

[60] *On Contracts*, 2nd ed., p. 409.
[61] *Beiträge zur Rechtsgeschichte im Bereich der keilschriftlichen Rechtsquellen*, Oslo 1931, p. 201 pp. *et seq.*
[62] *Ztschr. d. Savigny-Stiftung* (rom. Abtlg.) Vol. 49 (1929) pp. 51.
[63] *Zeitschrift für vergleichende Rechtswissenschaft*, 36, pp. 177 *et seq.*
[64] (1872) 7 Q.B. 598.

we think, too firmly established to be questioned now, that, where a person employs another to make a contract of purchase for him, he, as principal, is liable to the seller, though the seller never heard of his existence, and entered into the contract solely on the credit of the person whom he believed to be the principal, though in fact he was not. It has often been doubted whether it was originally right so to hold; but doubts of this kind now come too late: for we think if it is established law that, if on the failure of the person, with whom alone the vendor believed himself to be contracting, the vendor discovers that in reality there is an undisclosed principal behind, he is entitled to take advantage of this unexpected godsend . . . he may recover the price himself direct from the principal, subject to an exception, which is not so well established as the rule, . . . that nothing has occurred to make it unjust that the undisclosed principal should be called upon to make the payment to the vendor." Such an exception Blackburn J. found in that case where an undisclosed principal had paid his agent at a time when the third person did not know of the principal's existence. Here the third party unsuccessfully sued the principal for the price of the goods after the agent had stopped payment and the undisclosed principal was discovered. According to Blackburn J. it would produce intolerable hardship if a third person could sue the undisclosed principal who had bona fide and without moral blame paid his agent at a time when the third party still gave credit to the agent alone and knew of no one else. He himself said of the exception (at p. 610): "It may be said, perhaps truly, this is the consequence of that which might originally have been a mistake, in allowing the vendor to have recourse at all against one to whom he never gave credit, and that we ought not to establish an illogical exception in order to cure a fault in a rule. . . ." [65]

In reality the idea that the third party has his own original right against the undisclosed principal is not the basis of this decision. Rather it is based on the view that the third person has only a right against the agent and that he may, when the principal is disclosed, elect instead of suing the agent, to take over the agent's right to an indemnity from the principal. On this analysis the third party obtains satisfaction from the undisclosed principal because the principal is liable to the agent to pay, or to provide the funds with which the agent may pay the third party. In other words, he may indirectly hold the undisclosed principal responsible for the fulfilment of the agent's contracts. Only this will explain why a payment from the principal to the agent before the disclosure of the agency to the third party may preclude the third party from suing the principal. It implies that the third party has not his own

[65] The decision in *Armstrong* v. *Stokes* was sharply criticised in the case of an unnamed principal in *Irvine* v. *Watson* (1879) 5 Q.B. 414 C.A., where Brett J. said: "if the case *Armstrong* v. *Stokes* arises again, we reserve to ourselves sitting here the right of reconsidering it."

original right against the principal, because otherwise he would not be deprived of his right to sue the principal by something which, unknown to him, passes between the principal and the agent, with the result that he risks having to look for payment to an insolvent agent.

Nevertheless it would not be correct to explain the whole institution of undisclosed agency as a sort of assignment at the moment of disclosure. The idea of an assignment to the third party of the agent's right to indemnity against the principal as explaining the principal's liability,[66] and of an assignment to the principal of the agent's rights against the third party as explaining the principal's right to sue the third party,[67] approximates to the Continental rule of "indirect agency," but does not represent the English approach. This is shown by the rule [68] that the undisclosed principal may be sued by the third party even when the agent has no right to an indemnity from the principal because their contract is void or the agent has acted contrary to his instructions. Another illustration is the decision in *Danziger* v. *Thompson* [69] showing that the English rule does not accord with the idea of assignment. Here an infant had rented a flat from the plaintiff under an agreement in writing and expressed to be made between the plaintiff and the infant, who was therein described as the "tenant." It was held that oral evidence was admissible to show that the infant entered into the agreement as an agent of her father, the real tenant, and the plaintiff recovered judgment against the father. This presumed that the infant had never been a party to the contract, but only a mere "conduit pipe," as agent, in which rôle contractual incapacity was irrelevant.[70]

Consequently the decision in *Armstrong* v. *Stokes* must be considered a deviation from the general principle of undisclosed agency.

If the undisclosed agency were a sort of assignment, the decision of the House of Lords in *Keighley, Maxted & Co.* v. *Durant*,[71] that an undisclosed principal may not ratify a contract, would also be inexplicable. Lord James said: "To establish that a man's thoughts unexpressed and unrecorded can form the basis of a contract so as to bind other persons and make them liable on a contract they never made with persons they never heard of seems

[66] See Ames, *Lectures on Legal History*, p. 459; Montrose, (1938) 16 *Canadian Bar Review* 770–1.

[67] See A. L. Goodhart and C. J. Hamson, (1932) 4 Camb. L.J. 320.

[68] *Watteau* v. *Fenwick* (1893) 1 Q.B. 346.

[69] [1944] K.B. 654.

[70] A typical sign of the diversion of the explanations of the "undisclosed agency" is shown by the fact that the adherents of the agency-idea take the liability of the agent as "in tort or the result of an estoppel" (*e.g.*, Note in *Harvard Law Review*, Vol. 33, p. 595). while the exponents of assignment give as the reason for the liability of the principal "that the agent has done an act for which the principal should respond just as for a tort" (*e.g.*, C. A. Wright, *University of Toronto Law Journal*, I, p. 41).

[71] [1901] A.C. 240.

a somewhat difficult task," and Lord Macnaghten supported him by stating that " it is a well-established principle in English law that civil obligations are not to be created by, or founded upon, undisclosed intentions." This would not apply if there were a true contract only between the third party and the agent, and the undisclosed principal, by way of assignment, became a party later on. Goodhart and Hamson used this theory of assignment to reconcile undisclosed agency with the general rules of contract as a pure agreement between the parties themselves. But this strait-jacket does not fit the undisclosed agency and the arguments put forward by the House of Lords cannot be rejected on the ground that in an undisclosed agency all obligations are based upon disclosed intentions.

The truth is that the direct liability of the undisclosed principal is, *ex hypothesi*, not part of the disclosed intentions. But this is not necessary if the underlying idea is the doctrine of consideration. It was because the idea of mutual assent had replaced consideration that the judges were obliged to regard undisclosed agency as an anomaly. Thus Lord Davey stated (at p. 256): " the rule which permits an undisclosed principal to sue and be sued on a contract to which he is not a party, though well settled, is itself an anomaly and to extend it to the case of a person who accepts the benefit of an undisclosed intention of a party to the contract would, in my opinion, be adding another anomaly to the law and not correcting an anomaly."

But in reality no extension is involved at all. Roman law had already recognised that the nature of ratification is identical with precedent authorisation. The maxim "*mandat est qui ratum habet*," expresses the fact that ratification is an authorisation subsequent to the main contract. The real anomaly is therefore rather that the House of Lords rejected the application of an existing legal principle.

There are also other decisions of the same period all tending towards the liability of the agent and whittling away at least the third party's right of election between the agent and the principal, which is so characteristic of the English institution. An example is the rule of merger, according to which recovery of judgment against the agent amounts to a " conclusive election." [72] Even if the judgment remains unsatisfied, and even if the existence of the undisclosed principal was not known until after judgment, the third party's right against the principal is barred in law.

In addition to the explanation in terms of election, this solution is also sometimes justified by the doctrine that when a contract is merged into a judgment, there is no longer room for another judgment. Because the action *transit in rem judicatam*, there cannot be any further action against the same defendant or against any

[72] *Priestley* v. *Fernie* (1865) 3 H. & C. 977; *Kendall* v. *Hamilton* (1879) 4 App. Cas. 504.

other person upon that cause of action. But as Glanville Williams [73] has pointed out, this is a purely technical reason. One has to look behind it to the resulting valuation of interests. And here we find only the same arguments, so often used generally against undisclosed agency, that the third party had never bargained for the liability of the undisclosed principal, his liability was a bounty given by the law, and therefore what the law had given the law could take away. . . .

Further examples of attempts to reduce the rights and duties of the undisclosed principal to a level corresponding to the just protection of interests are the decisions that an express or implied term of the contract may exclude the existence of an undisclosed principal. These decisions are especially interesting, since the doctrine of undisclosed agency was developed in the main in cases where, although the agent acted in his own name, it was well known that he had a principal behind him. They show that the special circumstances of undisclosed agency are increasingly taken into consideration by the courts although the common law does not distinguish in the first place between acting in another's name and acting in one's own. The reason given by Denman C.J. in the leading case of *Humble* v. *Hunter* [74] clearly discloses this discord when he says of the doctrine of the undisclosed principal: This doctrine cannot be applied where the agent contracts as principal, and he has done so by describing himself as "owner of the ship." But when does an agent of an undisclosed principal not contract as principal? If he does not, his principal is not undisclosed. Presumably what the court meant was that there can be no undisclosed agency where the agent contracts as the only contracting party. In *Formby* v. *Formby* [75] it was held that, where an agent had contracted as the "proprietor," no evidence was admissible to charge the undisclosed principal, because it would contradict the terms of the written contract. Similarly *Rederiaktiebolaget Argonaut* v. *Hani* [76] decided that the agent's description as "charterer" excluded agency, but this was soon overruled by *Drughorn's Case* [77] in the House of Lords. In the latter decision Lord Shaw of Dunfermline expressly said of *Humble* v. *Hunter* and *Formby* v. *Formby* that "the time may arise when the principles of those two cases may have to be reviewed in this House." Moreover, there is a strong dictum by Scott L.J. [78] that "both these cases have been discussed on many occasions and I venture to express the opinion that they can no longer be regarded as good law"—nevertheless *Humble* v. *Hunter* has not been overruled.[79]

[73] *Joint Obligations*, p. 94.
[74] (1848) 12 Q.B. 307.
[75] (1910) 102 L.T. 116.
[76] [1918] 2 K.B. 247.
[77] *Drughorn (F.), Ltd.* v. *Rederiaktiebolaget Trans-Atlantic* [1919] A.C. 203.
[78] *Epps* v. *Rothnie* [1945] K.B. 562.
[79] Powell, *The Law of Agency*, (1952) p. 130.

The important changes which have taken place in the law of undisclosed agency in face of changing views are obvious. The old conception that the third party has a right to make the principal liable as well as the agent is avoided in many instances. Apart from this the agent's lien against the principal increasingly mitigates in many respects the harshness of the rule that the undisclosed principal is the party to the contract from the beginning. In this way, the English law of undisclosed agency despite its different point of departure approaches the Continental system of "indirect agency."

But Continental law also tends to find a solution mid-way between its starting point and the English principle. It admits several exceptions which diminish the contrast between them. Its main difficulty is just the opposite of that of the English system. It has to look for a possibility of allowing the undisclosed principal to participate in the contract although he is not a party. It must recognise the fact that the transaction is intended to produce legal effects on the undisclosed principal, and this must find expression in a sort of direct relationship between principal and third party.

The consequence is that, although both systems start from opposed principles, their practical results do not differ so much in the end.[80] Here as elsewhere the trend of commercial law is towards international conformity. A description of this development and a comparison of the functions of the corresponding institutions must, however, form the subject of a separate article.

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[80] Schmidt-Rimpler in Rabel's *Zeitschrift* 1937, pp. 744 *et seq.*; E. Rabel, *The Conflict of Laws*, Vol. 3, p. 136.

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STANDARD FORM CONTRACTS

THE increasing use of standard form contracts is a subject which concerns everybody much more than is commonly realised and one to which lawyers have paid only casual attention. Neither the expression "standard form contract" nor any variant of it has acquired the status of a term of art or, indeed, any recognised and distinctive meaning: it is, therefore, as well to define what is meant by the expression in this article. The words "standard form contract" will be used to include every contract, whether simple or under seal and whether contained in one or more documents, one of the parties to which habitually makes contracts of the same type in a particular form and will allow little, if any, variation from that form. The average man, the man in the street or on the Clapham omnibus, is continually making such contracts and the probability is that they are the most important contracts that he ever makes. If he rents his house from the local authority or the owner of an estate his tenancy agreement will be in a standard form; he will have been supplied with gas and electricity only if he has signed a printed form of agreement; any item of furniture which he has bought on the hire-purchase system will be the subject of an agreement designed by a finance company; his wireless set, his motor-car and most of his electrical equipment will have been sold to him subject to standard terms. His work, if he is a manual worker in a large undertaking, a civil servant,[1] a local government officer or an employee of a big organisation, will almost certainly be based upon a contract of service, the conditions of which are set out in a printed document. His journey to and from work will be the subject of a contract of carriage on abstruse but unalterable conditions, and at least one of his leisure time activities, his football "pools," will be carried on subject to the most rigid regulations.[2]

In all these transactions the bargaining power of the parties is unequal: on the one side there is the ordinary individual and on the other a monopoly or powerful organisation with desirable goods or services to supply. The choice between not making a contract or making it on the only terms available is no choice at all and docile submission to the standard form, meek signature "on the dotted line," is the general rule. The method of creation of this type of

[1] *Cf. Rodwell* v. *Thomas* [1944] 1 All E.R. 700.

[2] Such regulations will, however, be binding "in honour only" and a clause even stronger than that used in *Rose and Frank* v. *Crompton Bros.* ([1925] A.C. 445) will bar any approach to the courts: *Appleson* v. *H. Littlewood, Ltd.* [1939] 1 All E.R. 464.

contract is well conveyed by the expression, originated by Saleilles,[3] contrats d'adhésion. The potential customer has the choice either to adhere to the standard form or not and the printed document which sets out the standard conditions will never see the red, green and purple ink beloved of the conveyancer when negotiating his terms.

Other transactions take place on standard forms of contract where the bargaining power of the parties is more equal. This is especially the case in what may be called commercial contracts, that is, contracts between parties both of whom are engaged in trade, business or commerce.

Standard form contracts have a long history in various fields of commerce, particularly in that of shipping. Charter parties and bills of lading are still based on ancient forms and even the complicated marine insurance policy has changed little during the centuries. The problems arising from the use of such documents are mainly problems of construction and, in seeking to find a solution, the lawyer has the benefit of the many decisions interpreting nearly every phrase that is used in the traditional forms. The problems which are discussed in this article arise comparatively rarely.

In other fields of commerce the use of standard form contracts is a new phenomenon and there is a general tendency for more and more contracts to be embodied in elaborate printed documents where previously they were made in a simple form, the parties relying on the common law and statutes, such as the Sale of Goods Act, 1893, to establish their rights and liabilities. The more that monopolies and combines extend their activities the less bargaining power remains and there may be just as much inequality between a small trader and a large combine as there is between a railway company and a passenger.[4]

It is, however, mainly with transactions between private individuals and large organisations that this article is concerned.

The position of standard form contracts under the common law can be summarised in a series of divisions of possibilities. These all assume the absence of duress, fraud or misrepresentation. They are best expressed numerically :—

1. A person who accepted an offer which is based on standard conditions, the terms of which were all specifically brought to his notice, is bound by these conditions, even if he expressed his objections to them.[5]

2. If a person accepted an offer made subject to standard conditions, but was unaware of their contents, the first question to ask is whether he signed the form containing the conditions or not :—

[3] *De la Declaration de Volonté*, 1901.
[4] *Cf. Palmolive Co.* v. *Freedman* [1928] Ch. 264.
[5] *Walker* v. *York and North Midland Ry.* (1853) 2 E. & B. 750; *Eric Gnapp, Ltd.* v. *Petroleum Board* [1949] 1 All E.R. 980.

(I) If he signed the form he would be bound by the conditions,[6] even if he did not know the language in which they were printed.[7]

(II) If he did not sign the form the second question to ask is whether he knew of the existence of the conditions :—

(i) If he knew of the existence of the conditions he will be bound by them.[8]

(ii) If he was ignorant of the existence of the conditions the third question to ask is whether some, though not necessarily adequate, notice of the existence of the conditions was given :—

(*a*) If no notice of the existence of the conditions was given he will not be bound by them.[9]

(*b*) If notice of the existence of the conditions was given, the fourth question to ask is whether or not the document in which they were contained or referred to was a " common form " document[10] :

(A) If the document was a " common form " document he will be bound by the conditions set out or referred to in it.[11]

(B) If the document was not a " common form " document, the fifth question to ask is whether he knew there was writing on the document :—

(*α*) If he did not know that there was writing on the document he will not be bound by the conditions.[12]

(*β*) If he did know that there was writing on the document, the sixth question to ask is

[6] Lord Cairns in *Henderson* v. *Stevenson* (1875) L.R. 2 H.L.(Sc.) 470, 474; Mellish L.J. in *Parker* v. *S.E. Ry.* (1877) L.R. 2 C.P.D. 416, 421; Atkin J. in *Roe* v. *Naylor* [1917] 1 K.B. 713, 716; and Lord Haldane in *Hood* v. *Anchor Line* [1918] A.C. 837, 845.

[7] *Canadian Pacific Ry.* v. *Parent* (1917) 116 L.T. 165, and *The Luna and The Kingston* (1919) 36 T.L.R. 112.

[8] *Parker* v. *South Eastern Ry.* (1877) L.R. 2 C.P.D. 416, *per* Mellish L.J., at p. 421. *Harris* v. *Great Western Ry.* (1876) 1 Q.B.D. 515. See particularly the judgment of Blackburn J. at p. 532. See, similarly, Lord Haldane in *Hood* v. *Anchor Line* [1918] A.C. 837, 845.

[9] *Henderson* v. *Stevenson* (1875) L.R. 2 H.L.(Sc.) 470, *per* Lord Cairns L.C., p. 476; *Walls* v. *Centaur Co., Ltd.* (1922) 126 L.T. 242; *Fosbrooke-Hobbes* v. *Airworks, Ltd.* (1936) 53 T.L.R. 254; *Chapelton* v. *Barry U.D.C.* [1940] 1 K.B. 532; *Olley* v. *Marlborough Court, Ltd.* [1949] 1 All E.R. 127, 134.

[10] *Watkins* v. *Rymill* (1883) 10 Q.B.D. 178, in which Stephen J. first drew the distinction between common form documents and others, although Mellish L.J. in *Parker* v. *South Eastern Ry.* (1877) L.R. 2 C.P.D. 416, 422, had also drawn a similar distinction without using the words " common form."

[11] *Watkins* v. *Rymill, supra.*

[12] *Parker* v. *South Eastern Ry., supra.* The opinion here expressed by Mellish L.J. as to what was the proper direction to give to the jury was approved by the House of Lords in *Richardson* v. *Rowntree* [1894] A.C. 217.

whether the notice given to him of the existence of conditions was reasonable notice.[13]

(*aa*) If it was, he will be bound.[13]

(*bb*) If it was not, he will not be bound.[13]

This tabulation appears to offer only three chances of escape[14] to a person ignorant of the contents of conditions which a company with whom he is dealing are seeking to thrust upon him. In practice the odds are even heavier against him because of the special treatment given in the last 30 years to one of the most important documents of the type with which we are concerned, the railway ticket. Although these have never authoritatively been raised to the rank of " common form " documents,[15] they have been given special treatment and although the courts have gone through the motions of asking the questions suggested in *Parker's Case*, they have ignored any answers given by juries unfavourable to the binding quality of conditions incorporated in a normal railway ticket.[16]

There are still some forms of tickets which are not treated in the same way as railway tickets and in respect of them a jury's answers to the questions suggested in *Parker's Case* are given more respect.[17] But, if it is possible to generalise on such a wide subject, it is probably true to say that there is a tendency for printed conditions of all kinds to be held to be binding whether or not both parties are aware of their effect.

It is probably also true to say that the vast majority of conditions appearing in the countless types of standard form contracts are designed only to clarify the bargain and to facilitate the operation of the contract. The only cause of complaint against such conditions is that they are frequently unnecessarily prolix and, therefore, are seldom read by the person who signs or receives the document incorporating them. Other conditions are, however, designed purely to protect the party who produces the standard

[13] *Richardson* v. *Rowntree*, *supra*. The questions put to the jury in the court of first instance in this case were slightly different from those designed by Mellish L.J. in *Parker* v. *South Eastern Ry.*, *supra*, and are more simple. They are substantially those at (B), (II) and (*β*) in that order.

[14] Those at (a), (*α*) and (bb).

[15] It is true that Swift J. in *Nunan* v. *Southern Ry.* (1923) 130 L.T. 131, 134, talks of railway tickets as " common form " documents, but he only assigns to them the attributes of a common form document so long as there is no " issue as to whether the document does contain the real intention of both parties."

[16] *Thompson* v. *L.M.S. Ry.* (1930) 141 L.T. 382, 385; *Penton* v. *Southern Ry.* (1931) 144 L.T. 614. If the customary works " For conditions see back " (which, as Professor Hughes said in 1931 (47 L.Q.R. 462) have acquired a " mystical significance ") are missing, the answers to the questions are given proper weight: *Sugar* v. *L.M.S. Ry.* [1941] 1 All E.R. 172.

[17] See, for example, *Skrine* v. *Gould* (1912) 24 T.L.R. 19, 21 (football ticket); *Chapelton* v. *Barry U.D.C.* [1940] 1 K.B. 532 (deck chair ticket); *Henson* v. *L.N.E. Ry. and Coote & Warren, Ltd.* [1946] 1 All E.R. 654 (railway " walking pass "). *Cf. Ashby* v. *Tolhurst* [1937] 2 All E.R. 837, in which the terms of a car park ticket were treated as binding.

form from liability, and it is these conditions which merit further consideration.

In 1859 Erle J., in *McManus* v. *Lancashire and Yorkshire Ry.*[18] said that :

> " The notion that customers of railways require protection on account of incapacity to resist oppression, is not more true than the notion that, against a large proportion of customers, railway companies stand in need of every aid the law can afford."

The big organisations producing standard form contracts certainly take advantage of such aids. They can afford the best legal advice and most of them employ competent legal staffs.[19] On the other hand, neither the persons with whom they make contracts nor any body representing their interests are consulted about the form the contract should take, unless statute law dictates that they should be so consulted. If at any time a condition designed by a big organisation is construed adversely to it by the courts it is an easy matter for the condition to be redesigned. In 1884, in *Woodgate* v. *Great Western Ry.*,[20] an action for damages caused by the failure of a train, shown in timetables, to run as a through train, Smith J. remarked that he had very little doubt that the condition which was printed on the Great Western timetable was altered or printed for the purpose of getting out of the decision in *Le Blanche* v. *London & North-Western Ry.*[21]

The following year Huddleston B., in giving judgment for the railway company in *McCartan* v. *North-Eastern Ry.*, [22] an action brought for expenses caused by the unpunctuality of a train, said :

> " Now it is quite obvious that it was the intention of the railway company to exclude themselves from every species of liability that they could exclude themselves from. They had the advantage of previous cases in this and other courts from which they might be able to draw up their conditions, and I have no doubt that they availed themselves of that."

So confident have the judges been that companies using standard form contracts are both hard-headed and well advised, that they have from time to time interpreted such contracts in favour of the companies designing them, holding that the companies must have

[18] 4 Hurlst. & N. 327, 346.

[19] Scrutton L.J. in *Great Northern Ry.* v. *L.E.P. Transport and Depository, Ltd.* (1922) 127 L.T. 664, 670, confessed that his speculation as to what railway companies were after was futile because their intelligence was far beyond him !

[20] (1884) 51 L.T. 826, 832.

[21] (1876) 1 C.P.D. 286. This decision is not material to this argument.

[22] (1885) 54 L.J.Q.B. 441, 443. He went on to point out that it was quite clear, since the case of *Haigh* v. *Royal Mail Steam Packet Co.* (1883) 52 L.J.Q.B. 640, that if a company used apt words for the purpose they might make a contract excluding themselves from all liability.

intended the words of the contracts to give them the utmost protection.[23] The basis of these decisions seems to have been that if the doubtful clauses in the contracts were interpreted one way they would give some protection to the companies who designed them; if they were interpreted a second way they would add nothing to the general law: therefore they must be interpreted the first way. Many other types of contract, however, contain unnecessary or redundant conditions: it seems a false conclusion that, because a clause is inserted in a contract, that clause must cover some point upon which the general law is silent.

These authorities were followed in the recent case of *Alderslade* v. *Hendon Laundry, Ltd.*[24] in which the company pleaded, in defence to an action for the loss of handkerchiefs sent to their laundry, a condition endorsed on the laundry book in these words: "The maximum amount allowed for lost or damaged articles is 20 times the charge made for laundering." The Court of Appeal held that this clause, which was a common one in laundry contracts, must extend to cover the company's negligence because otherwise it would lack subject-matter.

It is difficult to reconcile these decisions with the principle of construction that *verba fortius accipiuntur contra proferentum*. An attempt to do so was made by Scott L.J. in *Beaumont-Thomas* v. *Blue Star Line, Ltd.*[25] in which case the plaintiff, who sued for damages for personal injuries caused by the defendants' alleged negligence whilst he was a passenger on their ship, had received a ticket containing a condition that passengers took upon themselves "all risk whatsoever of the passage" and another condition exempting the company from liability for loss or damage arising from a list of causes "or from any other cause whatsoever." Negligence was not specifically mentioned. Scott L.J. drew a distinction between the common law duty of a carrier of passengers to use due skill and care and the double duty of the carrier of goods to ensure their safe delivery as well as to use skill and care. He said that:

> "This fundamental difference in the basic contract caused the common law courts of England during the last 100 years to make a difference in the interpretation of general words of exception from liability according as the contract to be construed was one imposing the double duty or only the one duty. In each interpretation they had two principles to guide them, (1) the rule of construction *contra proferentum*, and (2) the natural reluctance to read into a contract a release from the

[23] *Rutter* v. *Palmer* (1922) 127 L.T. 419; *Turner* v. *Civil Service Supply Association, Ltd.* (1925) 134 L.T. 189; *Fagan* v. *Green & Edwards, Ltd.* (1925) 134 L.T. 191. Compare Devlin J. in *Alexander* v. *Railway Executive* [1951] 2 All E.R. 442, 447.

[24] [1945] 1 All E.R. 244. *Cf. Davies* v. *Collins* [1945] 1 All E.R. 247.

[25] [1939] 3 All E.R. 127, 130. See also *Canada Steamship Lines* v. *Regem* [1952] 1 All E.R. 305, at p. 310. (In this case the Privy Council applied the principles stated by Lord Greene M.R. in the *Alderslade Case* so as to restrict the operation of an exemption clause.)

> duty of skill and care unless quite unambiguous language made that construction unavoidable. . . . In the case of double duty, the courts have treated the exception as prima facie directed to the absolute undertaking of safe delivery, but as not applying to the performance of the duty of skill and care. On the other hand, in a contract where there was no duty except the duty of skill and care, the courts have construed the same words of exception in the opposite sense—namely, as directed to the duty of skill and care for the two simple reasons (1) that some meaning must be given, and (2) that no other meaning than an exception of liability for negligence was left."

The Court of Appeal applied the second interpretation and held that the conditions excluded a right of action for negligence.

There seems to be no good reason why the courts should have adopted two different interpretations: if they had not done so but had maintained the same interpretation for both double duty and single duty contracts the practical result would have been that, in the case of the latter, the parties producing the forms of contract would have taken steps to see that the words they used specifically excluded claims for negligence and every other type of claim which they wished to exclude. This would have been desirable because it would have left their customers in less doubt about their rights. With all due respect to Scott L.J.'s "simple reasons," it seems strange logic that, because a party to a contract designs a condition which, interpreted in a way in which the courts interpret similar conditions in other types of contract, would not affect the common law position of that party, therefore another interpretation must be resorted to which will alter the common law position of that party. It is almost like saying that, because a man puts a notice board on his land to the effect that trespassers will be prosecuted, therefore, because the common law knows no crime of trespass, such a crime should come into existence to give efficacy to the landowner's words.

The rule of interpretation adopted in all these authorities is now so well established that, whatever its merits as a guide to the actual intention of both parties to a contract, the party who designs a form of contract containing an exclusion of liability may, unless he owes a double duty of the type mentioned by Scott L.J., deliberately frame his clause in a vague way, relying upon the rule to bolster it up.

Are there, however, in any types of contract, any lengths to which such a person may not go in excluding his liability or in giving himself rights to which he would not be entitled at common law? Obviously he may not commit fraud, use duress or make misrepresentations [26] but may he insert conditions which are not

[26] *Curtis* v. *Chemical Cleaning and Dyeing Co., Ltd.* [1951] 1 All E.R. 631. See also *Harling* v. *Eddy* [1951] 2 All E.R. 212.

likely to be noticed and which a reasonable person would not expect to encounter?

From time to time there have been *obiter dicta* indicating that unreasonable or irrelevant conditions would not be binding in such circumstances. For instance, Byles J., in *Van Toll* v. *South Eastern Ry.*,[27] considered that a person taking a document, such as a cloakroom ticket, containing conditions and putting it in his pocket without reading it, assented to its terms conditionally on those terms being reasonable. Similarly, Bramwell L.J., in *Parker* v. *South Eastern Ry.*,[28] thought that there was an implied understanding that there was "no condition unreasonable to the knowledge of the party tendering the document and not insisting on its being read—no condition not relevant to the matter in hand." On the other hand he thought that people did not ordinarily put unreasonable terms in their contracts and if they did the fact would soon be known. This refreshing piece of naïvety from the judicial bench is only to be understood when one sees what Bramwell L.J. instanced as an unreasonable condition—one whereby the owner of goods deposited at a cloakroom should forfeit £1,000 if the goods were not removed in 48 hours.

Some more modern *obiter dicta* in favour of treating unreasonable conditions as invalid can be found in *Thompson* v. *L. M. S. Ry.*[29] where both Lawrence and Sankey L.J. expressed the view that if there was a condition unreasonable to the knowledge of the company tendering a ticket, the passenger would not be bound. They gave no indication of the degree of unreasonableness that would suffice to invalidate a condition, except that Sankey L.J. spoke of conditions "so unreasonable that nobody could contemplate that they exist" and gave an example similar to that of Bramwell L.J. They both held that the condition with which they were then concerned was reasonable.

On the other hand there have been several decisions in favour of the validity of conditions alleged to be unreasonable. In some of these cases the court came to its decision because it did not consider the condition in question to be unreasonable[30]; in others the court has given a twofold reason for its decision, saying that the condition was reasonable but if it were not it would still be valid[31]; and in still others the court has declined to consider the question of reasonableness. This last attitude was taken by the court in the case of *Gibaud* v. *Great Eastern Ry.*[32] in which

[27] (1862) 12 C.B.(N.S.) 75, 88.
[28] (1877) 2 C.P.D. 416, 428.
[29] (1930) 141 L.T. 382, 390, 391.
[30] For example, *The Luna and The Kingston* (1919) 36 T.L.R. 112, *per* Hill J.
[31] For example, *Woodgate* v. *Great Western Ry.* (1884) 51 L.T. 826, 830, *per* Hawkins J., and *Pratt* v. *South Eastern Ry.* [1897] 1 Q.B. 718, 720, *per* Cave J.
[32] (1920) 125 L.T. 76, 78. See also the penultimate paragraph of the judgment of Scott L.J. in *Couchman* v. *Hill* [1947] 1 All E.R. 103, 105.

Bray J. expressly disagreed with the dicta of Bramwell and Byles JJ. and then went on to say that :

> " Every contract is avoided by fraud, and if the condition is so irrelevant or extravagant that the party tendering the ticket must have known that the party receiving it could never have intended to be bound by such a condition, then I do say that the assent of the party receiving the ticket was obtained by fraud and he would not be bound. The mere fact that the judge or jury considered the condition unreasonable would not, in my opinion, be sufficient justification for a finding that the assent was obtained by fraud." [33]

The judgment of Sankey J. followed very closely the lines of that of Bray J. It is worth noting, however, that he did not put irrelevance under the heading of fraud but considered conditions not binding if they were so irrelevant as to be entirely foreign to the contract. He gave, as an instance of a fraudulent condition, one whereby the article deposited would be forfeited if not reclaimed in five minutes and, as an instance of an irrelevant condition, one requiring the depositor to become a shareholder in the company's undertaking before he was entitled to reclaim the article deposited.

Certainly terms of that kind are not inserted in their contracts by such sober bodies as railway companies or their successor, but this is not to say that harsh, unfair or unreasonable conditions might not be imposed by companies having the necessary economic power to refuse to bargain or the good fortune to escape detection until the contract is concluded. There has, however, never been a case decided in the plaintiff's favour because a condition of a contract, not subject to statutory restriction, was unreasonable,[34] harsh, or unfair and it is apparent that no conditions in a standard form contract could, apart from statute, be invalidated on the score of unreasonableness, unless they were of a fraudulent nature. As has been tersely said by Viscount Haldane L.C.,[35] " if the law authorises it, such a contract cannot be pronounced to be unreasonable by a Court of Justice."

This being so, a very wide field is left to the person preparing a list of printed conditions to appear or be incorporated in a standard form contract. That full advantage is taken of this

[33] Pollock, *Contracts*, 13th ed., p. 42, uses the words " *Per* Bray J., *Gibaud* v. *G.E. Ry.*" to cover a statement which seems to be in direct contradiction to the judgment of Bray J. and in accordance with the dicta with which he was expressly disagreeing. Pollock's statement is that " P. (the party whom the party tendering the conditions seeks to hold to them) is entitled to understand that conditions offered by reference are not manifestly irrelevant or unreasonable." There is, however, no authority for the use of the disjunctive in this sentence.

[34] The case of *Clarke* v. *West Ham Corporation* [1909] 2 K.B. 858 is no exception, although Farwell L.J., in the Court of Appeal, said that if the question of reasonableness were relevant, he thought the proposed contract would be clearly unreasonable.

[35] *Grand Trunk Ry. of Canada* v. *Robinson* [1915] A.C. 740, 747.

position is evident from the fact that the legislature has, in a number of cases, found itself obliged to curb the enthusiasm of such persons. By the same criterion it is evident that the originators of such contracts take no trouble to see that their terms are made available to their customers unless they are obliged to do so.[36] It is impossible to set out within a reasonable compass every Act of Parliament which restricts the freedom of a person designing a form of contract. Such enactments take many patterns: they may make the insertion of certain clauses illegal or ineffective or both; they may make compulsory the insertion of certain clauses; they may make compulsory the adoption of a certain form of contract; they may provide that certain clauses shall be deemed to have been incorporated or adopted unless they have been expressly or impliedly negatived; they may provide that certain clauses shall not be incorporated in a contract unless special steps are taken to bring them to the attention of the customer; or they may simply require that certain steps shall be taken to bring to the notice of the customer certain clauses of the contract or provisions of statutes relating to it.

Examples of this type of legislation can be found in the fields of carriage,[37] pawnbroking,[38] bills of sale,[39] moneylending,[40] hire-purchase [41] and industrial assurance.[42] It is remarkable that the legislation in three of these six examples was introduced not by the Government of the day but by a private Member,[43] and that the relevant section in the Railway and Canal Traffic Act, 1854, was the result of a clause introduced into the Bill by a member of the House of Lords, not a member of the Government, after another clause, intended to protect the consignors of goods by railways from the unreasonable conditions imposed by the railway companies, had been expunged in the House of Commons "through the powerful influence of the railway interest." [44]

Perhaps these examples will suffice to show that there are types

[36] See, *e.g.*, Industrial Assurance Act, 1923, s. 9; Moneylenders Act, 1927, s. 6; and Hire Purchase Act, 1938, ss. 2 (2) and 6 (1).

[37] See Carriers Act, 1840, s. 4; Railway and Canal Traffic Act, 1854, s. 7; Railways Act, 1921, ss. 42 to 45; Transport Act, 1947, ss. 76 to 80; Road Traffic Act, 1930, s. 97.

[38] See succession of Acts starting with 1 Jac. 1, c. 21, and ending with the Pawnbrokers Acts, 1872 and 1922. (See particularly ss. 12, 15 and 24 of 1872 Act.)

[39] Bills of Sale Act (1878) Amendment Act, 1882, s. 9. See *Polsky* v. *S. and A. Services* [1951] 1 All E.R. 185 for an interesting application of this Act.

[40] Moneylenders Act, 1927, s. 6.

[41] Hire Purchase Act, 1938, s. 2 and Sched., and ss. 4, 8 and 11–13.

[42] Industrial Assurance and Friendly Societies Act, 1948, s. 12 (2), and Third Schedule.

[43] Mr. Monk introduced the Bills of Sale Act (1878) Amendment Bill (*Hansard*, Vol. 267, col. 394); Mr. Burman introduced the Moneylenders Bill (*Hansard*, Vol. 203, col. 727); Miss Wilkinson introduced the Hire Purchase Bill (*Hansard*, Vol. 330, col. 729).

[44] *Per* Earl Gray: *Hansard*, Vol. 133, col. 604. The clause which became s. 7 of the Railway and Canal Traffic Act, 1854, was drawn by Lord Lyndhurst: *ibid.*, col. 1141.

of contract with which the legislature has interfered in order to check the growth of unreasonable conditions, to secure fair bargains and to provide that the parties have means of knowing their rights. What is not so well known is the extent to which the Government has acted in an indirect way to persuade offenders to mend their ways, preferring to avoid direct action in favour of intimidation. This intimidation takes the form of an implied threat of legislation if a satisfactory attitude is not taken by the bodies who have given cause for complaint.

The first example of this new approach concerns contracts for the carriage of passengers by railway. At common law there was nothing to prevent all responsibility for negligence causing death or bodily injury to be avoided by conditions on a ticket, provided that the tests laid down in *Parker* v. *South Eastern Ry.* were satisfied. The practice of excluding liability in this way was developed by the railway companies in respect of all contracts for carriage at reduced rates, which are, in number, a high proportion of the contracts which a railway company makes.

The fear of legislation on the same lines as section 97 of the Road Traffic Act, 1930,[45] had a beneficial but belated effect on the railway companies. In 1937, in reply to a question in the House of Commons, in which the practice of the railway companies and road transport companies was compared to the detriment of the former, Mr. Burgin, the then Minister of Transport, said that he had been in communication with the railway companies, who had informed him that they were not prepared to accept liability for accidents to passengers travelling by train with cheap daily tickets. He was considering what was the most useful action he could take in the matter.[46] The implied threat in this statement was apparently sufficient, for a few months later he was able to make an announcement in these words:—

> "The four main line railway companies have informed me that they will not in future seek to exempt themselves by special contract from their liability at common law in respect of injury, fatal or otherwise, to passengers (other than those holding privilege tickets or free passes) when travelling in the companies' trains or whilst in the act of entering, or alighting from, such trains. Where in the case of passengers holding workmen's tickets who may be injured in such circumstances the railway companies' liability is limited by special Act, the railway companies will not plead such limitation. The conditions of issue of cheap day, half day and evening tickets and

[45] This section provides that any contract for the conveyance of a passenger in a public service vehicle shall be void so far as it purported to negative or to restrict the liability of any person in respect of the death of, or bodily injury to, the passenger while being carried in, entering or alighting from the vehicle, or purported to impose any conditions with respect to the enforcement of any such liability.

[46] November 3, 1937. *Hansard*, Vol. 328, col. 931.

> workmen's tickets will be amended accordingly in due course." [47]

A natural but incorrect assumption to make after reading this answer was that, except in the case of privilege tickets and free passes, no special exemptions of liability to passengers remained. On March 8, 1948, in reply to questions,[48] the Minister of Transport stated that the Railway Executive and the London Transport Executive would, in accordance with the practice of their predecessors, exempt themselves from their liability at common law in respect of injury, fatal or otherwise, to railway passengers holding workmen's tickets or certain tickets issued at reduced fares, only when the accident happened whilst the holders of such tickets were not travelling in a train or entering or alighting from a train. This answer contains a positive statement that exemption would be sought in certain cases, defined only by exceptions, these exceptions being in substance the same as the subject-matter of the 1938 answer.[49] What are these cases and why should the railway companies and now the Railway Executive exempt themselves from liability in respect of them? The cases apparently include all accidents at railway stations in which holders of cheap day or workmen's tickets are injured otherwise than when actually travelling, entering or alighting from a train. Such an accident occurred in March, 1947, when a Mrs. Palmer, who had a workmen's ticket, tripped and fell under a train at Seven Kings station, as a result of which she lost both her legs. The fact that she was unable to obtain compensation from the railway company [50] caused women in the district to organise a petition calling on the Government to provide compensation in cases like hers.[51] The petition was presumably effective, because on July 19, 1948,[52] the Minister of Transport, in reply to a question by Mr. D. N. Pritt, K.C., said:

> "I have been in consultation with the British Transport Commission. The conditions of issue of workmen's and other types of cheap tickets on all parts of the Commission's undertaking will be considered in the preparation of charges schemes under Part V of the Transport Act, 1947. In the meantime, a more liberal view will be taken of claims made by the holders

47 April 14, 1938. *Hansard*, Vol. 334, col. 1129.

48 *Hansard*, Vol. 448, col. 775. Both the questions asked for legislation to be introduced prohibiting the practice of contracting out of liability for negligence to passengers carried on workmen's tickets or on cheap fares. The Minister said there was no present intention to introduce legislation on this subject.

49 These exceptions must not be confused with the exceptions (privilege tickets and free passes) to the subject-matter of the 1938 answer. In the way that the March, 1948, answer was worded it was unnecessary to refer to privilege tickets and free passes, and one is left to infer that they still incorporate complete exemptions from liability.

50 The railway undertakings vested in the British Transport Commission on January 1, 1948: Transport Act, 1947, s. 12.

51 See *The Star* newspaper (London) for February 26, 1948.

52 *Hansard*, Vol. 454, col. 2.

of tickets issued at less than ordinary fares where such claims, though strictly untenable in law, may, on general grounds, when the ticket holder is in no way to blame, warrant an *ex-gratia* payment."

Nobody could grumble about the " more liberal view " eventually taken of Mrs. Palmer's case because she received an *ex-gratia* payment of £8,500 [53]: what people could grumble about is the fact that a claim for compensation in cases like this should be entirely at the mercy of the British Transport Commission or their agent, the Railway Executive.[54]

The concessions obtained from the railways are the first example of a reform of standard form contracts by Government intervention without legislative action. It has not been uncommon, however, during the last decade, for the Government of the day to make some form of " gentleman's agreement " with monopolies or the leaders of a trade, usually acting through an association. An important instance of this is the agreement made in 1942 between the Government and the employers' organisations and insurance interests generally, by which these organisations and interests undertook not to rely on the receipt by a workman of compensation under the Workmen's Compensations Acts as a defence, under section 29 of the Workmen's Compensation Act, 1925, to an action at common law, provided that he brought his action within three months of the accident.[55] Mr. R. E. Megarry, in a note on Administrative Quasi-Legislation in *The Law Quarterly Review*,[56] points out several defects inherent in such agreements. The main flaw is that any person who is not a party to the agreement retains his common law or statutory rights. This was not so important in the case of the agreement with the railway companies because, apart from the four main line companies who were parties to the agreement, there were probably only a few miniature or mountain railways in the country, and these probably did not issue excursion tickets incorporating the objectionable clause. In the case of the workmen's compensation agreement, however, it was impossible that this could be made effective in every case because there was no obligation on an employer to join an " employers' organisation " or to insure, and there must, therefore, have been thousands of employers who did not consider themselves bound by the agreement.[57]

[53] *The Star* newspaper for August 26, 1948.

[54] The London Area Passenger Charges Scheme confirmed in 1950 now provides that no condition purporting to limit or exclude the liability of either the Railway Executive or the London Transport Executive to a passenger, not being the holder of a free pass, in respect of personal injury or death shall have effect. A similar provision has been included in the draft Charges Scheme for the railways outside London.

[55] July 2, 1942. *Hansard*, Vol. 381, cols. 500, 501.

[56] 1944. Vol. 60, pp. 125–9.

[57] Both workmen's compensation and the railway system have now been nationalised. The agreement about the former plays no part in the new industrial injuries scheme but the agreement about cheap fare tickets has been adopted and extended by the British Transport Commission.

The agreement about workmen's compensation did not concern standard form contracts, but is a very good example of the way a Government can avoid its obligation to legislate for social needs.[58] A more recent example, and one that does concern standard form contracts, is the vague and unenforceable arrangement made with the Institution of British Launderers in 1944.

Laundry companies commonly leave with their customers two or three "washing books," one of which is sent in with each consignment of laundry. These books usually contain a number of conditions, compiled by the Institution of British Launderers, including one about insurance and compensation. Under this the laundry company undertakes to make good loss by fire,[59] and to compensate for loss or damage caused by negligence to any article whilst in their possession. This latter liability is limited by the statement that "In no case shall compensation exceed an amount equal to twenty times the amount charged for laundering any such article."

On February 7, 1944, Judge Trevor Hunt, at Ilford County Court, held that such a limitation did not serve to protect a laundry company which had lost an article sent for laundering by the plaintiff, and which was worth much more than 20 times the laundering charge.[60] On February 22, 1944, Mr. Driberg called the attention of the President of the Board of Trade to this judgment, and asked whether he would make an order revising the customary limitation of liability. Mr. Dalton replied that there was no need to make an order because the court had allowed full compensation; that the judgment simplified the position and, in reply to a supplementary question, that a customer would be able to draw the attention of a laundry to the judgment just as easily as he might draw the attention of the laundry to any order that he might make.[61] Apparently neither the Ilford County Court decision nor the threat, implied in Mr. Dalton's replies, that he might take some action to prevent the practice if the judgment did not do so, had the desired effect, although it secured some relaxation of the practice: on June 6, 1944, Mr. Driberg again drew the attention of the President of the Board of Trade to the practice which had been "upheld by the courts" (presumably other county courts), and asked if he would take steps to make the limitation illegal. Mr.

[58] Another similar agreement affecting matters of tort rather than contract is that made in 1945 between the Minister of War Transport and insurers transacting compulsory motor-vehicle insurance business, and the supplemental agreement made in 1946 between the Minister of Transport and the "Motor Insurers' Bureau" set up by the insurers as a result of the first agreement.

[59] The liability for loss by fire is limited to the amount which the launderers receive from their insurance company in respect of the goods, notwithstanding the fact that there is no obligation on the launderers to insure those goods at all.

[60] *Smith* v. *Romford Steam Laundry*, *News Chronicle*, February 8, 1944, and *Law Journal*, April 22, 1944, p. 130.

[61] *Hansard*, Vol. 397, col. 626.

Dalton agreed that the practice was continuing, but said that the Institution of British Launderers, at the request of his Department, had advised its members to waive this limitation when they were satisfied that a larger claim would be justified.[62] He also said that he was advised that an order making the limitation illegal would not be within the scope of the Defence Regulations.[63] In January, 1945, the Court of Appeal allowed an appeal from a decision of the Willesden county court judge and decided that the customary limitation clause did protect a laundry in respect of lost goods,[64] but, presumably, the advice of the British Launderers' Institution, given at the request of the Board of Trade, is still in force. But what sort of protection does this advice give to the laundries' customers; and how many people, laymen or lawyers, know of its existence? The General Secretary of the Institution, in a letter to a legal paper,[65] says that "laundry proprietors, in assessing the value of a lost article, take into account the past history of the customer." To say the least, this is an unorthodox way of assessing a loss and one which can only be applied when the party making the assessment has the whip hand. One would have thought that if a customer had made previous claims which were genuine he should not be penalised by the use of a clause which is normally ignored; if, on the other hand, he had made false or inflated claims the laundry should have refused to make further contracts with him. The right arbitrarily to impose or disregard a condition which is forced upon customers by the united action of the laundries is one that causes hardship to the individual and makes the task of his lawyer impossible.[66]

The consideration of these various examples of types of common form contracts in which unreasonable conditions have at some time been prevalent does not exhaust the subject. As social conditions change, new types of common form contracts will be used and abused. New forms of service are constantly being offered by persons who are aware of modern requirements, or who are able to create a demand, and contracts will be devised, whenever the bargaining power of the person providing the service becomes sufficient, which protect him from contingencies the risk of which should fall on his own shoulders. An important example of this

[62] The General Secretary of the Institution claims that it was giving this advice before it received the Departmental request: *Law Journal*, July 15, 1944, p. 231.

[63] *Hansard*, Vol. 400, col. 1198.

[64] *Alderslade* v. *Hendon Laundry, Ltd.* [1945] 1 All E.R. 244. See *ante*, p. 323.

[65] *Law Journal*, May 20, 1944, p. 167.

[66] Apart from pure benevolence on the part of the launderer, there is no reason whatever why he should not refuse to pay more than £1 for a valuable lace table cloth worth £20 which has been destroyed by the grossest negligence of his servants if the laundry charges for it happen to be a shilling. However, according to a paragraph in "A Woman's Viewpoint" in the *Observer* of March 23, 1952, "laundries in the important 'Combined' group have changed to a policy of full compensation . . . compensation will be paid without argument."

phenomenon is the increasing practice of excluding the warranties and conditions otherwise implied under the Sale of Goods Act, 1893, in contracts for the purchase of goods, and substituting printed "Guarantees" of more doubtful value.[67]

The increase in the use of standard form contracts in the present century has been phenomenal. This is not so much due to the sudden increase in the number of Government boards and commissions, which in the main have taken over businesses and industries in which common form contracts were already in vogue, as to the steady, but less advertised, tendencies of trades and industries of various types to pass from the hands of the small man to the multiple firm or combine, and of other businesses to be formed into trade associations.[68]

It is expecting too much of the man in the street to ask him to discover his rights and liabilities under the many contracts he makes each day; to delve into the labyrinth of railway by-laws, time-tables and bills in order that he may find the conditions under which he is travelling; to read the small print on his laundry book before he sends his shirt to be cleaned, or to make a close study of his elaborate removal contracts before he moves house. Certain sets of standard conditions are adopted almost universally within a trade, for example, those prepared by the Institution of British Launderers, Ltd., but, nevertheless, nobody can be expected to become familiar with them. How much less can the layman be expected to realise the implications of the equally long, but completely variable, documents which emanate from the various business houses who have no strong trade association. He is constantly being asked to "sign on the dotted line," but rarely appreciates the legal consequences of his signature. Ignorance by

[67] Such "Guarantees" take many forms. The following are two examples taken from the "Guarantees" of reputable firms: "The '—— Brand' guarantee is liberally interpreted and is in lieu of any implied condition of trade usage or under the Sale of Goods Act"; "This warranty does not apply to damage arising from accident, misuse or fair wear and tear. . . . Under no circumstances whatever are we responsible for injury, damage, direct or consequential, arising from the operation, failure or breakdown of any machine or plant supplied by us, and any warranty at common law is hereby expressly excluded." These guarantees are invariably limited in time, usually to six or 12 months, and though they may be of great value during this time, a purchaser who discovers a serious fault in his purchase after the guarantee has expired is completely without remedy. Even their value during the guarantee period may be nullified by a condition making the selling company's judgment on all claims made under the guarantee final and conclusive and binding the purchaser to accept its decision. This is done, for instance, in the "Manufacturer's Warranty" of Ford cars. This warranty only covers the replacement of defective parts and not the cost of repairs. The exclusion of liability is a very wide one and covers not only rights under implied guarantees but also claims for negligence or breach of duty by the company or its servants. *Cf. Andrews, Bros. (Bournemouth), Ltd.* v. *Singer & Co., Ltd.* (1934) 150 L.T. 172.

[68] For some details of these tendencies, see the 77th (1945) *Annual Report of the Trades Union Congress*, pp. 183 to 192, and the figures there quoted from a paper by the Board of Trade statisticians, H. Leak and A. Maizels, on "The Structure of British Industry."

itself may cause no hardship, but if it is coupled with unfairness inherent in the conditions he has cause for complaint.

Competition should be based solely upon the quality and price of the goods or services to be provided, not upon the financial gain to be obtained from imposing unjust or unreasonable conditions. If the conditions of contract are the same for all who take part in a particular trade or business, they are left free to compete amongst themselves within the proper sphere of competition. At present this desirable state of affairs may exist in three types of cases: first, the trade or business may be one to which the use of standard form contracts has not spread and therefore all engaged in it are dependent equally upon the common law and general legislation; secondly, legislation relating to the particular trade or business may have ensured uniformity of terms; and thirdly, there may be a trade association or other organisation so effective as to secure that only one set of conditions is used throughout the trade or business.

Whilst in all these three types of cases the evil of competing forms of contract within a trade is eliminated, there is in the third type of case a danger of a still greater evil. The trade association, when drawing forms of contract, will have only the interests of its members at heart, and if its membership is sufficiently strong and the goods or services which its members offer are sufficiently in demand, it will be able to impose unreasonable conditions on the customers of its members. This is an advantage which such associations share with monopolies and both are liable to seize the advantage.[69] The former Master of the Rolls has summed up the position in the following words [70]:

> "Under present circumstances, large numbers of persons of comparatively humble means enter into legal relationships which were unknown 50 or so years ago. Houses are bought through building societies, furniture is bought on hire purchase, insurances of all kinds are effected, and in many other ways the lives of such people are involved in legal transactions of a kind which their grandfathers never knew. The other parties to those transactions are in many cases powerful corporations whose forms of contract leave much to be desired from the point of view of clarity, and often, I am bound to say, from the point of view of fairness."

[69] See, for instance, *Henson* v. *L.N.E. Ry* [1946] 1 All E.R. 653, *per* Scott L.J., at p. 657. "The attempt made by the railway company in the pass to put on an ordinary working man employed by others the very burdensome term in question shocks my mind. . . . It is such misuse of contract which makes the legislature tend to substitute status." In this case the Court of Appeal held that the document in question (a "walking pass" issued by the railway company to an employee of a firm of waggon repairers) did not constitute or form part of a contract between the railway company and the man concerned and did not debar him from recovering damages from the railway company for negligence.

[70] "Law and Progress," the Haldane Memorial Lecture for 1944, by the Rt. Hon. Lord Greene M.R. Printed in the *Law Journal Newspaper* for 1944, at p. 367.

The need to enact the various statutes mentioned earlier provides evidence of the tendency of people to impose unreasonable terms when they are able to do so. The passing of the Monopolies and Restrictive Practices (Inquiry and Control) Act, 1948, is a further recognition of the fact that most powerful firms and combines act in the interests of themselves rather than of the public, and are capable of acting completely against the public interest.

All the statutes mentioned so far have a limited subject-matter. The question arises whether anything could and should be done of a more general nature. The first possibility which suggests itself is the passing of an Act of Parliament, completely general in its scope, making void all unjust or unreasonable conditions in contracts. This was the solution applied to a limited field by section 7 of the Railway and Canal Traffic Act, 1854, which makes all conditions limiting a railway company's liability for neglect or default in the carriage of merchandise subject to the test of being just and reasonable.[71] This section remains in force in relation to passengers' luggage and special contracts coming within section 44 (3) of the Railways Act, 1921, but hard words have been said about it by the judges who have had to determine the question of reasonableness.[72] In *Manchester, Sheffield and Lincolnshire Ry.* v. *Brown*,[73] Lord Bramwell took the opportunity to say:

> "It seems to me perfectly idle and I cannot understand how it could have been supposed necessary, that it should be referred to a judge to say whether an agreement between carriers, of whose business he knows nothing, and fishmongers, of whose business he equally knows nothing, is reasonable or not."

This was the typical reaction of the judges to their unwonted task of deciding not only whether a condition had been agreed upon but also whether or not it was "just and reasonable."[74] If the field in which they had to make such decisions was suddenly widened from the present very restricted one to the whole range of

[71] It is interesting to note that in *Taubman* v. *The Pacific Steam Navigation Co.* (1873) 26 L.T. 704, in which case the plaintiff, a passenger on the defendants' vessel had signed a contract excluding the defendants' liability for loss of or damage to luggage, it was urged that the defendants could not screen themselves from liability for their own wrongful act and the Railway and Canal Traffic Act was designed to prevent such attempts. Bramwell B. dealt with this point in these words: "Then it is urged that in certain cases the legislature have interfered. That, so far as it goes, is against the plaintiff's case. And the court will not extend the Railway and Canal Traffic Act further than they can help, for it has been already the cause of more dishonest transactions than any Act of Parliament."

[72] It is not, however, the only enactment under which the ordinary courts have had to decide whether conditions of contract are reasonable. The private Act of the Electric Telegraph Company (16 & 17 Vict. c. ciii) provided (s. 66) that the public, without preference, should have the use of the company's telegraph, subject to reasonable regulations to be made by the company. See *M'Andrew* v. *The Electric Telegraph Co.* (1855) 25 L.J.(N.S.)C.P. 26.

[73] (1883) 8 App.Cas. 703, 718.

[74] See also the vigorous language of Lord Bramwell (*ibid.*, 720).

contract,[75] it would justify a revolt by the judges. It is true that they have now become accustomed, particularly in actions for tort, to consider what a " reasonable man " would do in given circumstances, but they never do so unnecessarily,[76] and to throw open for consideration the question of the reasonableness of the conditions of a contract would be an unmerited and unpopular increase of the judges' already onerous tasks of deciding whether or not a contract was made, what its terms were and how they should be interpreted. Even if the judges were prepared to accept this extra burden, however, it is doubtful whether they could discharge it satisfactorily. What appears to a lawyer to be a most reasonable condition may represent the harshest of bargains between economically unequal parties, whereas what seems an unfair and restrictive condition may be cheerfully agreed to in the normal course of a certain trade, financial advantages outweighing the disadvantages of the restrictions.

Quite apart from this question, the simple requirement that all conditions in contracts should be reasonable would not remedy two other main defects in the present system. The first of these is the unsatisfactory state of the law relating to standard form contracts under which completely ineffective methods of publishing conditions to be incorporated in such contracts suffice to make them binding. The second defect is the growing tendency for all and sundry to produce their own standard form of contract. This tendency leads to complete confusion of the man who deals with several such firms and increases his natural reluctance to study the documents which he is called upon to sign.[77]

Lastly, in matters of contract the parties wish to know, so far as is possible, how they stand from the outset. It is better for the question of reasonableness of a particular condition to be judged before it is inserted in a contract than after there has been some dispute on a contract: otherwise the parties will never know until

[75] It would be impossible to confine the scope of the Act to standard form contracts because there is no clear boundary between such contracts and contracts in general: to restrict it to printed contracts would be purely arbitrary.

[76] In tort, when this question arises, it is usually fundamental to the action or defence that the plaintiff or defendant acted unreasonably. Similar questions sometimes arise in contract cases because of an express condition introducing the word " reasonable," for instance, requiring that an act be done within a " reasonable time " or to the " reasonable satisfaction " of one of the contracting parties. Again the law of landlord and tenant frequently requires the court to decide whether consent to an assignment has been unreasonably withheld. But in all these matters the issue is relatively simple compared with the question of whether the insertion of a particular condition in a contract was reasonable. To decide this question in each case it would be necessary to consider the whole structure of the particular trade and the differing bargaining powers of the parties to the contract.

[77] For a typical example see *The Book of the Horse* (Brian Vesey Fitzgerald), p. 717. " Would-be purchasers get confused with the various descriptions and definitions under the clause (*sic*) of warranties, which have variations or additions according to the respective horse repositories."

it is too late whether or not the condition forms part of the contract.

Is there, then, any alternative to the present practice of dealing with each type of contract separately by special legislation when, but only when, it becomes obvious that nothing short of legislation will prevent harsh bargains being made? The simplest solution would be for an Act to be passed [78] setting up a tribunal or commission composed partly of lawyers, partly of business men and partly of representatives of people who, for want of a better word to describe those who suffer from the imposition of standard form contracts, can be called the customers. This commission could have the power and duty to prepare standard forms of contracts to be used in the trades or businesses specified in the Act.[79] Such forms would be embodied in statutory instruments and their use would be compulsory except to the extent that the commission thought fit to make certain clauses in them optional or alternative. The standard form would be incorporated in all contracts of the stipulated type whether or not the contract contained express reference to it, and any attempt to avoid or vary the standard form would be made nugatory and subject to penalties. In certain types of contract, notably contracts for the sale of goods, and certain types of contracts of bailment and carriage, the commission might well come to the conclusion that the general law was adequate to lay down the legal relationship of the parties, that no standard form

[78] The writer has gone so far as to prepare, using much of the material relating to the Transport Tribunal in the Transport Act, 1947, ss. 76 to 80, a rough draft of a Bill. The operative clauses provide for: (1) the establishment of a "Contracts Commission" consisting of three permanent members, who are experienced lawyers, and four *ad hoc* members to be selected, for each form of contract, two from a customers' panel and two from a contractors' panel, or, in the case of a form of contract used by a government department, public board, etc., from the appropriate department or board: the panels are to be made up after consultation between the appropriate government departments and organisations representative of business and trading interests for the one panel and consumers' and customers' interests for the other; (2) the reference to the Commission by any Minister of the Crown or by the permanent members of the Commission of any form of contract used in the transactions scheduled in the Bill; (3) the consideration of the form of contract and the preparation of a draft standard form of contract which might contain alternative and optional clauses; (4) the holding of a public inquiry into the draft form, at which objections to it can be made, followed by the settlement by the Commission of the standard form of contract; (5) the submission of the standard form to the Lord Chancellor who shall embody it in a statutory instrument stipulating the circumstances in which it is to be used and in which the alternative or optional clauses may be used and the method by which it is to be published; (6) the implied incorporation of the standard form into all appropriate contracts, all conditions inconsistent with it being null and void; (7) the supply to customers of copies of the standard form by the contractor; (8) the power to forbid the use of certain types of clauses in contracts for which no standard form has been settled; and (9) penalties for attempted evasions of the Act.

[79] Not to specify the trades or businesses in the Act would lead to the danger of the commission going to one extreme or the other and either restricting themselves to too narrow a range of contracts or attempting to legislate for every conceivable contract. It might frequently be found necessary to extend the list, but this could be done by extremely short amending Acts.

of contract was required, and that all that was necessary was that the use of certain types of clauses should be forbidden. To deal with this they should be given power to forbid, again through the medium of a statutory instrument, the use in particular trades of, for example, clauses contracting out of liabilities and conditions implied by law.

What are the defects and disadvantages of this solution? What are its merits and advantages, and do the latter so outweigh the former as to justify such a radical change in the English law of contract?

Defects and Disadvantages

1. *Unpopularity.* By far the most serious disadvantage of remedying the present system by means of a series of statutory instruments is the popular dislike of delegated legislation. This dislike has been intensified by the press campaigns against restrictions and controls which followed both world wars. For this reason the introduction of a new system would need careful explanation, both in Parliament and in the press, and all the advantages mentioned below would have to be made apparent. In particular, it would have to be made clear that this was a case of control for the direct benefit of the individual members of the State rather than for the benefit of the State itself, and that the traditional obscurity and inaccessibility of delegated legislation would not feature in the products of the commission.

2. *Litigation.* A possible defect in the scheme is that it might lead to increased litigation. This would depend upon the ability of the commission and the skill in draftsmanship of their staff. No doubt many of the conditions contained in their forms would follow the wording traditional in a particular trade or business,[80] the meaning of which has already been judicially interpreted, and, for the rest, good clear language would be preferable to the welter of words and jargon used at present by some commercial firms in their contracts. In any litigation that does take place the contents of the contract should at least be known, which is more than is often the case in present contract litigation.[81]

3. *Variety of contracts.* A third disadvantage or defect arises from the fact that many people nowadays profess to do their business in a slightly different way from that of their competitors. It might be that when the commission started their task they would find themselves almost overburdened by the number of special cases for which they would have to cater. Any attempt on their part to secure uniformity of method of business, as distinct from uniformity of form of contract, would be bitterly resented: it would also, of

[80] This would be particularly the case in the sphere of insurance.

[81] The dispute in nearly all the "ticket cases" was about whether or not the contract of carriage included certain terms.

course, be outside their terms of reference. There are, however, many ways in which they could deal with a special case: they could carefully limit the description of the trade or business for which a form of contract was designed, so as to exclude the special case; they could design optional or alternative clauses which could be used by the special case [82]; or they could design an entirely separate form of contract for the special case. This would all demand much hard work on the part of the commission, but on the other hand it would save the time of the people who at present draft the various special types of contract forms. If the commission think fit merely to use their negative powers of proscribing clauses in a particular type of contract the difficulty will not arise.

4. *Lack of knowledge.* The possible defect that would jump to the mind of most business men if they heard of this scheme is the likelihood that members of the commission would know little or nothing of their particular business. The commission's ability to learn would depend upon the quality of its members and staff and, if this quality were good, business men would be able to complain of nothing except that their subterfuges were being discovered.[83]

5. *Novelty.* To the minds of some people the very novelty of the scheme will itself be a defect. But the scheme is not altogether without precedent: the Transport Tribunal set up under the Transport Act, 1947, and its predecessors, the Railway Rates Tribunal, the Railway and Canal Commission and the Railway Commissioners have exercised since 1873 within their limited sphere [84] functions similar to those proposed for the commission. Joint Industrial Councils, Whitley Councils and the like are examples of machinery at work which are fundamentally akin to the proposed commission but which were completely novel when they were first constituted. To take another example from amongst many in the sphere of agriculture, the Pigs Marketing Board has the power [85] to determine the form of contract to be used for sales to registered curers of pigs.

[82] Permission to use optional or alternative clauses would have to be conditional upon steps being taken by the person using them to bring to the notice of his customers the fact that he was using them.

[83] The commission might well be guided by the words of Collins J. when sitting as a Railway Commissioner in the case of *Rickett, Smith & Co.* v. *Midland Ry.*, 9 R. & C.T. Cases 107, 112; [1896] 1 Q.B. 260, 264: "Vast interests have been committed to our keeping and a jurisdiction of great delicacy has been conferred upon us. . . . And yet I cannot suppose that Parliament intended to take the management of these great trading concerns out of the hands of the practical men who work them and to place it in the hands of the Railway Commissioners. It is of the utmost importance, therefore, that we should not travel beyond our proper province in exercising this novel jurisdiction."

[84] s. 76 of the Transport Act, 1947, now requires the British Transport Commission to submit to the Transport Tribunal for confirmation schemes which provide, where necessary, for determining the terms and conditions applicable to the services provided by the Commission.

[85] Bacon Industry Act, 1938, s. 20. Now temporarily suspended under the Defence (Agriculture and Fisheries) Regulations, 1939.

Merits and Advantages

1. *Fairness.* The great merit of the scheme is that it would ensure that, in general, conditions in contracts were fair. By so doing, it would help to remove the element of suspicion from all transactions between big companies and ordinary people.

2. *Certainty.* From the lawyer's point of view, the biggest advantage is that the terms of the greater number of contracts made in the future would be certain, and would be the same in all contracts for similar transactions. As a result, the number of different forms of contract for lawyers and the courts to interpret would decrease substantially and far less time would be wasted in solicitors' offices, barristers' chambers and the courts in trying to find out which documents, if any, formed part of the contract, and how they could be read together, if at all.[86] The effect might be less litigation instead of more.

3. *Uniformity.* There is no virtue in uniformity for the sake of uniformity, nor is there in variation for the sake of variation, but when two identical transactions take place it is convenient that the form of contract should be identical. Persons conducting many identical transactions with various customers have realised the benefits to be obtained from imposing on the customers a standard form of contract. What is now proposed is that the benefits should be reciprocated so that a customer trading with more than one firm would know that the same form of contract was being used in each transaction. As a result, he might acquire some knowledge of the contents of his contracts in cases where now he is hopelessly confused. The trader or business man will also benefit from this uniformity inasmuch as he will be saved the effort of preparing his own standard forms or the lawyers' fees for preparing them for him.[87]

4. *Flexibility.* A standard form of contract produced by the commission for a particular trade or business should be so well prepared that it could, in normal circumstances, last for many years without variation, but whenever an alteration is required it would be a comparatively simple matter to make it. For this reason, it is desirable that all the present forms of contract contained in Acts of Parliament, such as the Bills of Sale Act (1878) Amendment Act, 1882, should be replaced by forms in statutory instruments issued by the commission.

[86] Sometimes it is necessary to go beyond the contract documents and study the pages of *Hansard.* See *supra*, pp. 329 *et seq.*

[87] Uniformity of contracts can save money in another way: according to the 1948 report of the London Master Builders' Association there is a growing use by local authorities of the Royal Institute of British Architects' standard form of contract. Many authorities, however, still use their own non-standard contract: "In the view of the Association this can only lead to higher prices because the careful builder will wish to cover himself against unknown eventualities."

5. *Accessibility.* All the products of the commission would be easily available to the public, through H.M. Stationery Office and booksellers. Laymen who are interested in any particular type of contract [88] could purchase the form whilst lawyers would no doubt all obtain a complete set, which, if kept in a loose-leaf binder, could be added to as new forms were designed.[89] This would be a great improvement on the present state of affairs both because everyone would know, as a result of appropriate advertising, where to turn for their forms of contract and also because, having found the form, they would be able to read it without difficulty : statutory instruments are well-printed documents and compare favourably with the average forms in use by business houses.

6. *Knowledge of existence of conditions.* It is now possible in law to bind oneself to conditions about which one knows nothing when making a contract, whether it is embodied in a signed document or not. Comparatively few people probably realise that when they receive an excursion ticket, a laundry book or a rent book they are making a contract on the basis of conditions prepared by the other party as distinct from conditions implied by law. Nor do many realise that, when they buy some electrical gadget and receive a guarantee of it, they have been deprived of rights which the law would otherwise have given them. In other cases they are led into traps and pitfalls but can never plead ignorance as an excuse [90]: their signature on a document or tacit acceptance of it binds them to it.

If, however, all the common types of contracts were made on terms embodied in statutory instruments, the knowledge would soon get abroad that such terms did exist and could easily be found if wanted.

Sir Henry Maine, writing in 1861,[91] concluded a chapter on "Primitive Society and Ancient Law" by saying that the movement of progressive societies had hitherto been a movement from Status to Contract. The dictum is completely untrue of the twentieth century. Legislation by governments of differing political creeds has all tended to accentuate the "status" of people,

[88] *Cf.* Bentham's belief that if, amongst other requirements, "the laws which concern every member of the community were arranged in one volume and those which concern particular classes in little separate collections . . . the law would then be truly known; every deviation from it would be manifest; every citizen would become its guardian; its violation would not be a mystery, its explanation would not be a monopoly; and fraud and chicanery would no longer be able to elude it." *The Theory of Legislation, Principles of the Civil Code*, Part I, Chap. 17.

[89] The statutory instruments would also appear automatically in various legal works already published and would there be annotated.

[90] Hire purchase contracts were full of such pitfalls before the passing of the Hire Purchase Act of 1938.

[91] *Ancient Law*, Chap. V. It is true that he assigned a restricted meaning to the word "status," which was to signify the personal conditions of the member of the Family, as distinct from the Individual, but his famous dictum has commonly been taken to apply to the whole field of civil law.

particularly of people employed by others, and to ensure that their rights and obligations are dependent not upon their bargains with their employers but upon Acts of Parliament or statutory instruments. [92] The scheme suggested in this article would accelerate this return to "status," and give to many people, including the owners of businesses, a "status" which they have never enjoyed before. The only harm done by this would be to those who seek to profit by unfair bargains. The positive advantages far outweigh the disadvantages, all of which can be overcome.

A final word must be reserved for the contracts of Government Departments, boards, corporations, "authorities" and "executives." These contracts commonly suffer from the same defects as those of other monopolies, except that they are not usually open to attack on the grounds of deliberate unfairness.[93] There is no reason why the scheme should not apply to them and every reason why it should. By continuing (under the new title of the Transport Tribunal) the Railway Rates Tribunal, with increased functions, Parliament has admitted [94] that the form of public contracts may be determined by a body other than the responsible department. If the contracts of other government monopolies were dealt with in the same way, public confidence in their fairness would undoubtedly increase.[95]

H. B. Sales.*

[92] N.B., the remark of Scott L.J., quoted *supra*, footnote 69.

[93] *Cf. Evans* v. *Rogers* [1946] 2 All E.R. 64, 65, in which Lord Goddard C.J. said: "This case raises a question of some difficulty by reason of the form of contract which every milk producer is now obliged to make with the Milk Marketing Board. As has been pointed out before in this court, it is one which may inflict considerable hardship on the farmer because he is bound to sell to the board and to nobody else. He has no voice in the form of contract; the board prescribe it, and they are the only possible purchasers." See also the remarks of Singleton J. at p. 67, and those of Humphreys J. in *Watson* v. *Coupland* [1945] All E.R. 217, 218.

[94] Transport Act, 1947, s. 72.

[95] The provisions for the setting up of "Consultative Committees" for transport (Transport Act, 1947, s. 6) and "Consultative Councils" for electricity and gas (Electricity Act, 1947, s. 7; Gas Act, 1948, s. 9) show that the Government recognises that the customers are entitled to have some say in the management of these undertakings. The Postmaster-General has seen the advantage of imposing conditions under a statutory instrument rather than by a standard form contract and has recently terminated all agreements made by him for the supply of a telephone service, intending to replace such agreements by regulations to be made under the Telephone Act, 1951.

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REPORTS OF COMMITTEES

Report of the Committee on the Law and Practice Relating to Charitable Trusts [Cmd. 8710]

As a student and a teacher of law before the war I had some nodding acquaintance with the law as it affected charities, largely, it must be confessed, in three relatively watertight compartments. My knowledge of Real Property made me realise that there were certain restrictions on the powers of a charity to receive and hold land and in my study of Equity I had naturally been fascinated by the judicial decisions, of which the Delphic Oracle might well have been proud, from which the legal profession was expected to divine when a charity was a charity and when it was not. Moreover, my interest in Administrative Law had led me to realise that there was a body of persons called the Charity Commissioners who seemed to have been doing for quite a long time some of the things to which Lord Hewart and his merry men objected. The sphere of action of the Commissioners, however, seemed shrouded in obscurity and that seemed to be the reason why so far they had escaped the thunderbolts of Jove.

When I joined the Administrative Staff of the University of London, I soon discovered that, while the University itself and two of its largest colleges, which had been incorporated into the University by private Acts of 1905 and 1908, were exempt from the Charitable Trusts Acts, the remainder of our colleges were not. And so began a series of skirmishes on their behalf with the Ministry of Education to which jurisdiction over educational charities had been transferred by Orders in Council under the Education Act of 1899. From the hit-and-miss nature of our encounters, however, it became very clear that the law governing the administration of charities was very much a law of imperfect obligation. But in 1948 the calm was shattered by the decision in *Re No. 12 Regent Street*,[1] in which, at the instance of the Chief Land Registrar, Mr. Justice Jenkins decided that section 87 (2) of the Education Act, 1944, differed materially from its predecessors and really meant that all conveyances of land to educational charities were void unless registered with the Ministry of Education within six months. Then, in 1949, the Attorney-General successfully opposed the attempt of Royal Holloway College, a full constituent college of the University of London, to obtain immunity from the Charitable Trusts Acts in a private Bill which it was promoting. The appointment of the Nathan Committee was indeed the *deus ex machina* of what looked like becoming a tragedy.

[1] [1948] Ch. 735.

My experience, therefore, leads me to endorse without reservation the statement of the Committee (paragraph 108) that—

> "The statute law of charitable trusts . . . now presents to lay trustees and, we may add, to not a few of their professional advisers, an impenetrable jungle."

It also makes me appreciate the courage with which the Committee has approached this tangled problem, the clarity with which it has analysed the past and the present law on the subject and the conciseness with which it has formulated the remedies.

To be sure, there had been a "John the Baptist" at work before. The publication by Lord Beveridge in 1948 of *Voluntary Action* and of the volume of supporting evidence in the following year had demonstrated beyond peradventure that the law relating to charitable trusts needed rethinking and reconsidering as a whole. Perhaps it is not ungracious to suggest that these books suggested to the Nathan Committee the desirability of attacking its task by first considering the value of the work of charities in the modern social structure. Despite the scope of the powers and duties of the Central Government and of Local Authorities in the field of the Social Services which are impressively summarised in Appendix I to the Majority Report, the Committee came unhesitatingly to the conclusion that the community stood in as much need of voluntary service as ever it did in the past though, clearly, there was a need of new powers to enable charities to use their resources with greater advantage to meet the changed needs of the present.

At this stage, some statistics may be of assistance (paragraph 545). Neither the Charity Commissioners nor the Ministry of Education could give accurate figures of the number of charitable and educational trusts but estimated the totals at 80,000 and 30,000 respectively. Of these 110,000 trusts,

(a) a quarter are a hundred years old or more;
(b) between one-third and two-thirds have an annual value of £25 or less;
(c) less than 30,000 trusts returned accounts to the Charity Commissioners or the Ministry of Education in 1951;
(d) the total stock and securities held is estimated at £200,000,000;
(e) the total value of the land held is unknown.

The Committee provides a brilliant summary of the history of the law and practice relating to charities in a mere fifteen pages (pp. 16–30). After attempts at much-needed reform at the beginning of the nineteenth century, the Charitable Trusts Acts of 1853 and 1855 created the Charity Commissioners, an independent body not responsible to a Minister of the Crown, which was given full advisory and supervisory powers over endowed charities, *i.e.*, charities the capital of which has to be preserved and which can use only their income. Those powers included the right to require the submission of accounts and to control dealings in land. In

1860 the Commissioners were given concurrent powers with the Court of Chancery to make and vary schemes; such powers were limited by the *cy-près* doctrine, as were the concurrent powers of the Court of Chancery, to which, incidentally, an appeal could be taken from the Commissioners. Under that doctrine, a modification of a charitable trust was permissible only if the specific intention of the donor could no longer be carried out; even so, the substituted scheme must be as close as possible to the intention of the donor. The only big breach in the *cy-près* doctrine was made by the Endowed Schools Act, 1869, which gave wide powers (transferred between 1900 and 1902 to the Board of Education) to reorganise the trusts of educational endowments in such a way as to render them most conducive to the advancement of education. The exercise of such powers was not subject to an appeal to the Court of Chancery, but on certain grounds an appeal might be made to the Judicial Committee of the Privy Council. If a petition were presented against the proposals either House had power to secure their annulment.

Against this background the Committee comes to its main recommendations.

1. *The definition of a charity*

At present the definition of a charity is based on the preamble to the Statute of Charitable Uses, 1601, which was kept alive by section 13 of the Mortmain and Charitable Uses Act, 1888. This definition proceeds by enumerating the types of charity recognised by the law and was judicially interpreted by Lord Macnaghten in *Commissioners of Income Tax* v. *Pemsel*,[2] where he classified charitable trusts in the well-known four categories. Despite some difficulties about the fourth category, the Committee came to the conclusion (paragraph 140) that no case was made out for an alteration in the content of the legal meaning of charity. They recommended, however, that there should be a statutory definition based on Lord Macnaghten's classification, preserving the case law, both prior to and later than the *Pemsel Case*, as it stands. When comparable situations arose in connection with the Bills of Exchange Act, 1882, the Partnership Act, 1890, and the Sale of Goods Act, 1893, a somewhat different formula was used. Section 97 (2) of the Bills of Exchange Act, for example, says:

> "The rules of common law including the law merchant, save in so far as they are inconsistent with the express provisions of this Act, shall continue to apply to bills of exchange, promissory notes, and cheques."

I think it would be preferable to follow this precedent rather than to "preserve the case law as it stands" by legislative enactment. Otherwise the benefit of the statutory definition may be lost.

[2] [1891] A.C. 531.

2. *The modification of the cy-près doctrine*

In general, the terms of a charitable trust can at present be modified only within the limits permitted by the *cy-près* doctrine to which I have referred earlier. If, to quote a leading case, an improvement in the Mediterranean situation renders superfluous an endowment to redeem British slaves in Turkey or Barbary, the court can draw up another scheme for the utilisation of the trust funds but the new scheme must resemble as much as possible the original object. The only really big statutory inroad on this judicial doctrine was made by the Endowed Schools Act, 1869, under which the Charity Commissioners originally, and now the Ministry of Education, have powers to alter educational trusts before they become literally incapable of execution. The Committee rightly points out that, with income tax at 9s. 6d. in the £, charitable trusts enjoy a substantial indirect subsidy from the State which has a corresponding right to see that the income of those trusts is used to the greatest public advantage. Taking as its model Scottish law, which so often has pointed the way to reform in England, it proposes (paragraph 365) that the Legislature should lay down in general terms the circumstances in which the objects of a trust should be regarded as obsolete or obsolescent. In formulating the terms of the amended trust, the Scottish precedent again should be followed and regard should be had, not only to the conditions of the trust itself, but also to the public interest, the spirit of the intention of the benefactor, the interest of the locality with which the trust is connected and the possibility of effecting economy in administration by combining two or more endowments. If, however, a trust is less than 35 years old, the founder (if still alive) or the trustees must concur.

3. *Who should be the scheme-making authority?*

For the proposed relaxation of the *cy-près* doctrine there will, I think, be unanimous approval. The same cannot be forecast of the recommendations of the Committee that these enlarged powers should be given to a reconstituted Board of Charity Commissioners or, in the educational sphere, to the Ministry of Education, and not the Chancery Division of the High Court. Mr. Henry Salt attacks this suggestion in a powerful Minority Report from which I respectfully dissent. With the relaxation of the *cy-près* doctrine, a wide discretion will be vested in the scheme-making authority. The judicial function is essentially one which is exercised intermittently because the judge can act only when a case comes before him for trial. Moreover, co-ordination of his views on the policy to be followed with those of his brethren in the Chancery Division would be but imperfectly achieved by the doctrine of precedent. What is needed is an authority which will have constantly under review the policy to be followed regarding changes in charitable trusts and which has day-to-day experience of the administration of such

trusts. An essential feature of any successful arrangement would be that trustees could obtain informal advice on the extent to which changes in trust deeds are likely to be authorised. For these reasons I believe that the Committee is right in recommending (paragraph 365) that the scheme-making authorities should be the Charity Commissioners and the Ministry of Education.

Few would dissent from the view that trustees should have a right of appeal from the Commissioners or the Ministry to the Chancery Division. The Committee have "no suggestion to make for modifying the existing powers of the Chancery Division in the matter of scheme-making" (paragraph 342). If this means that the powers of the Chancery Division are to be limited by the *cy-près* doctrine, I think that the proposal needs reconsideration. If the *cy-près* doctrine is to be relaxed for all trusts as the Report recommends (paragraph 365), the retention of the restricted existing powers of the Chancery Division can lead only to confusion and perhaps to a conflict of jurisdiction.

4. *Proposals for reorganising the Charity Commission*

The present Board of Charity Commissioners in effect consists of one unpaid Commissioner who sits in the House of Commons, and two paid Commissioners who are, in fact, civil servants and invariably lawyers. Now I yield to none in my admiration for the legal mind but, to borrow a phrase from the Lord Chancellor in "Iolanthe,"

> "It nevertheless can't be denied
> That it has its inconvenient side."

The glory and the weakness of the legal mind is its natural devotion to precedent and yet its fear of precedent—a fear which Portia expressed:

> "Twill be recorded for a precedent,
> And many an error by the same example
> Will rush into the state."

I therefore welcome the suggested reconstitution of the Board of Charity Commissioners so that it shall consist of a small body of five to nine persons of standing and experience in public and charitable affairs, for this reconstitution, as the Report indicates (paragraph 378), is a necessary corollary of the suggested relaxation of the *cy-près* doctrine. The Report goes further and urges that the senior officials of the Commission should be drawn from the administrative as well as the legal civil service and pleads for a really adequate establishment which will make it possible for schemes to be modified in a much shorter time than the year or more which is required at present.

The Committee also recommends that there should be a ministerial spokesman for the Board in Parliament, and suggests the Lord President of the Council, the Lord Chancellor or the Home Secretary for this role.

5. Imperfect trust instruments

The Committee deals at some length with the vexed question of imperfect trust instruments. The legal definition of a charity, never very clear at the best of times, was even further obscured by the decisions in *Oxford Group* v. *Commissioners of Inland Revenue* [3] and in *Ellis* v. *Commissioners of Inland Revenue*.[4] The essence of these decisions is that, though the principal objects of a trust are charitable, if its aims include subsidiary non-charitable objects, the entire trust is void *ab initio*. To meet this situation, which was only partially dealt with by section 37 of the Finance Act, 1950, the Committee recommends that if such trusts had been in operation for six or more years on December 31, 1950, they should be validated by Act of Parliament and their assets dedicated to objects which are legally charitable. For such trusts which were less than six years old on the specified date, the privilege would be given only if their primary object was charitable and the trustees could show that they had expended the trust funds predominantly on the purposes which were legally "charitable."

The Committee makes these recommendations on the ground that, until the decisions in these two cases, the view of the profession was that the trusts in question were valid. Following this line of reasoning, the Committee, by a majority, thinks that there is no case for validating such trusts, if created after 1950, because the benefactors and their legal advisers should have been aware of the effect of these decisions and should have known how to avoid the difficulty thereby created. Similarly, the validation of imperfect trusts such as that in the *Diplock Case* [5] is ruled out because any competent lawyer ought to know that the courts have consistently refused to regard a bequest for "charitable or benevolent purposes" as constituting a valid charitable trust.

The Committee was not unanimous in reaching its decision against recommending a wider relaxation of the law in favour of imperfect trust instruments and I think that this will be the main section of the Report which will attract criticism. While it is perfectly true that any competent legal adviser ought to know the law and be able to advise his client properly, the fact remains that legal advisers sometimes do make mistakes and thereby frustrate the clear intention of the benefactor. This seems to me to be a much more important consideration than that which weighed with the Committee, namely that, in default of a valid legal disposition, the next-of-kin have certain statutory rights of succession. The examples of legislation in New Zealand, Victoria and New South Wales, to which the Committee refers, show that there is no special difficulty in laying down with some precision the situations in which imperfect trust instruments should be

[3] [1949] 2 All E.R. 537.
[4] (1949) 31 Tax Cases, 178.
[5] [1944] A.C. 341.

validated and I think that the consensus of opinion is behind Professor Keeton when he urges that where an obvious technical slip has been made the court ought to have the power to rectify it in the interests of charity.[6]

6. *Improved information about charitable trusts*

One of the difficulties which stand in the way of the proper use of charitable trusts is the lack of accurate information about them. There is no automatic obligation on trustees to inform the Charity Commissioners or the Ministry of Education of the existence, scope and endowments of their trusts. In the end, the vast majority of charitable trusts come ultimately to the notice of the appropriate authority but shortage of staff has hitherto prevented a proper classification of the information. The Committee recommends (paragraph 178) that it should be compulsory for trustees to send to the Commissioners or the Ministry certain basic details of the trusts they administer within a stated period from their foundation or, in the case of existing trusts, by an appointed day; failure to comply with this obligation would make the trustees liable personally to a small fine. From this information classified lists of trusts operating in each area would be sent to the local authorities concerned.

Where trustees do send in copies of their annual accounts there is no legal obligation on them to have such accounts audited. The Committee recommends (paragraph 214) that an obligation should be imposed on trustees to submit each year audited accounts, copies of which should be transmitted to the local authorities in the area in which the trust operates. Failure to fulfil this obligation would render the trustees personally liable to a small fine.

7. *Mortmain and Charitable Uses Acts*

The Committee, after surveying the highly illogical manner in which these Acts operate, came to the conclusion that they are anachronisms in the twentieth century. It therefore recommends their repeal, together with the obnoxious section 87 (2) of the Education Act, 1944, to which reference has already been made (paragraph 276).

8. *Range of investments*

One of the interesting features of law reform in England has been the extent to which remedial legislation has followed respectfully in the wake of enlightened professional practice. For example, the Married Women's Property Acts at the end of the nineteenth century merely conferred automatically rights which earlier were available to individual married women who were

[6] *Current Legal Problems*, Vol. 2, p. 86 (1949).

properly advised by competent lawyers. The Committee, in recommending a drastic extension of the powers of charitable trustees to invest, is, in effect, recommending the adoption of what has for many years been done in many individual trust deeds. It is for the economist rather than the lawyer to explain the reasons why this development has taken place. It will suffice here if I say that the Committee make two important recommendations:

(i) That charities should be expressly authorised to acquire both freehold and leasehold property for both investment and functional purposes (paragraph 298);

(ii) That trustees should be permitted to invest up to half of the capital of a charitable trust in the debentures and shares of financial, industrial and commercial companies whose securities are quoted on the London Stock Exchange, subject to certain safeguards (paragraph 296).

9. *Exemptions from the jurisdiction*

The Committee recommends that the bodies at present exempt from the jurisdiction of the Charity Commissioners or the Ministry of Education should retain their immunity and, in some cases, be given wider privileges. One important recommendation is that all university institutions should be exempt from the Charitable Trusts Acts and should enjoy the powers to set up unified trust funds which Liverpool and Birmingham obtained by private Acts in 1931 and 1948 and which were given to Oxford and Cambridge by the Universities and Colleges (Trusts) Act, 1943. Proposals are also made for a special method for revising out-of-date trusts at universities.

As I have said earlier, " endowed " charities are subject to the jurisdiction of the Charity Commissioners and the Ministry of Education. " Plain " charities, *i.e.*, those the income of which comes from voluntary recurrent contributions, are exempt, while " mixed " charities are within the jurisdiction only to the extent to which their capital must be preserved (paragraph 17). The Committee recommends that plain trusts should be subject to the powers of inquiry conferred by section 9 of the Charitable Trusts Act, 1853. The trustees of mixed charities, in addition to being brought within section 9, should also be under an obligation to record with the Board particulars of their purposes and their assets and any changes therein. The Committee recommends (paragraphs 234–6) that the land and securities of all charitable trusts within the jurisdiction should be vested in the Official Trustee of Charity Lands and the Official Trustees of Charitable Funds. These offices were created by the Charitable Trusts Acts of 1853 and 1855 and are " corporations sole." The purpose of this recommendation is to obviate the trouble and expense of altering documents of title to land and securities when individual trustees change; the powers of control are not affected but remain with the trustees. While this

recommendation has much force for charities with small endowments, it will prove burdensome for larger charities which are well organised to deal with the management of their assets and I think that its operation should be more restricted than the Committee proposes.

10. *Suggestions on the organisation of Charitable Trusts*

The Committee makes some interesting suggestions for reorganising the administration of certain charitable trusts (paragraph 578). As I have said earlier, between one-third and two-thirds of the 110,000 known charitable trusts have an annual income of less than £25. The Committee recommends that the opportunity should be taken of merging such small trusts, wherever possible. It also recommends that the assets of trusts having as their beneficial area a county or a smaller local government unit and with an annual income of less than £100 should be transferred to a county unified trust fund and receive in return a proportionate share of the income of that unified trust fund. This would reduce the administrative work involved in such trusts and would ensure that sound financial advice was available for preserving their capital.

The Committee does not recommend that there should be a wholesale sweeping up of these small trusts into county or regional "common good" trusts though it realises that there is a place for such trusts in the national life. It recommends (paragraphs 620–21) that communities should be encouraged to institute such common good trusts for their areas and that such trusts should be instituted by statute on a national basis for England and Wales; towards the latter, the Government should make available an initial capital sum and also transfer its rights to *bona vacantia* which bring in on an average £100,000 a year.

The Committee then turns (paragraphs 622–65) to consider what would be the role of charitable trusts in the national life if its recommendations were accepted. They must, naturally, continue to fill gaps in the social services provided by the State. They should also continue to fulfil their historic role of pioneering. The best examples today of this second function are to be found in the case of the large trusts, such as the Nuffield Foundation. To the extent to which they assume permanent commitments they correspondingly restrict their freedom of action to sponsor fresh developments. They must, therefore, of necessity largely limit their activities to encouraging new ventures, leaving it to other sources to take on the permanent commitment if a venture proves its social value. As the Secretary of the Carnegie United Kingdom Trust said in evidence before the Committee,

> "It is the business of [such] trusts to live dangerously."

This does not, of course, imply that spheres of private charity and State aid are mutually exclusive. Too many people rush to the

conclusion, that, if the State steps in, the private benefactor should step out. The mischievous effect of this fallacy can be seen in the world of university finance. Because Treasury grants on a very substantial scale are now made to universities, it does not follow that there is no room for the private benefactor. In a sense he plays an even more vital role now than he did in the past for he represents a potential source of income which need not necessarily carry with it the inevitable restrictions which the acceptance of public money involves. The same situation exists in the National Health Service. Those who conceived the Act seem to have assumed—I think erroneously—that the day of the private benefactor, of voluntary service and of self help was past. I think that the experience of the past few years has shown how erroneous that assumption was.

But even if this point is conceded, and it is agreed that private charity and State aid are not mutually exclusive, there is still a great problem to be solved. Private effort will not give of its best if the sole result is to relieve *pro tanto* the ratepayer or the taxpayer. And here—as the Committee rightly points out—is the problem of our age: how, in a period when the State is extending its activities more and more, the worth, and indeed the necessity, of voluntary effort can be effectively demonstrated. The Report ends with some remarks on another modern problem, that of public relations, and makes some sensible suggestions which, I hope, will commend themselves to the Charity Commissioners and the Ministry of Education.

The documentation of the Report is excellent. The Appendices contain full references to the relevant legislation and verbatim extracts of the more important parts of the Charitable Trusts Acts, a summary of the statutory powers and duties of the Charity Commissioners, an index of cases, a glossary of the more important terms used and a general index. *O si sic omnes* !

The Committee was specifically precluded by its terms of reference from making any suggestions about altering the law of taxation affecting charities though it was ingenious enough to get indirectly round this restriction and to slip its hand into the public purse by means of its recommendation about *bona vacantia*. I have always thought that section 28 of the Finance Act, 1946,[7] whereby donors lost their immunity from surtax in respect of seven-year covenants made in favour of charities after the passing of the Act, was a great mistake (Fifth Report of the Select Committee on Estimates 1951–52, p. 40). If the Government is really persuaded of the intrinsic value of voluntary effort, it should not only restore that immunity but should also consider introducing the system which operates in Canada and the United States whereby gifts to charities are allowed as deductions before taxable income is computed. I know

[7] Now s. 415 of the Income Tax Act, 1952.

this suggestion has recently been rejected by the Committee on the Export of Works of Art in its Report (section 270), which was issued last year, but I remain impenitent. In these days when the volume of personal savings is constantly shrinking and the margin of which the taxpayer has to dispose after meeting his commitments ever grows less, some direct incentive is needed if more money is to be attracted for charitable objects. That incentive can, in present circumstances, be provided only through the medium of tax concessions.

The Nathan Committee has done its task magnificently and has indicated clearly what reforms in the law governing charitable trusts are necessary. Legislation may be expected in the near future to overcome the difficulties created by the decisions in the *Oxford Group Case* and the *Ellis Case*. Subject to some minor differences, the Government have accepted the Committee's proposals under this head, but the trusts to be brought within the scope of the legislation will be those created before December 16, 1952, the date of the Government's statement, and not December 31, 1950, as suggested by the Committee. Let us hope that the rest of the recommendations of the Committee do not languish indefinitely in some departmental pigeonhole.

REPORT OF THE SELECT COMMITTEE TO INVESTIGATE FOUNDATIONS

(United States Government Printing Office, Washington, 1953)

IT is a remarkable coincidence that the House of Representatives should have instituted an inquiry into charitable foundations while the Nathan Committee was sitting and that the report of the investigating committee should have been published within a few days of the Nathan Report. The background of the Congressional inquiry was, however, very different from that of Lord Samuel's motion in the House of Lords which led to the creation of the Nathan Committee. The background was the anti-Communist hysteria which now pervades the United States, as exemplified by the activities of Senator McCarthy, the McCarran Act and the investigation into alleged subversive activities in universities in the United States which is at present being carried on by the House Committee on Un-American Activities under the Chairmanship of Congressman Velde.

All this is made plain by the terms of the Resolution of the House of Representatives, dated April 4, 1952, instituting the inquiry, which instructed the Select Committee (Report, p. 2):—

> ". . . to conduct a full and complete investigation and study of educational and philanthropic foundations and other comparable organizations which are exempt from Federal income taxation to determine which such foundations and organizations

> are using their resources for purposes other than the purposes for which they were established and especially to determine which such foundations and organizations are using their resources for un-American and subversive activities or for purposes not in the interest or tradition of the United States. . . ."

Partly owing to the motives behind the investigation and partly because the Second Session of the 82nd Congress was due to end at the beginning of 1953, the Committee was ordered to report not later than January 1 of this year. The financial appropriation to enable the Committee to operate was not, however, voted till July 2, 1952 (Report, p. 2) so that the Committee had just under six months to do its work. It is a tribute to the staff of the Committee, particularly its counsel, Mr. Harold M. Keele, and to the co-operation of the foundations that the material for such a complicated inquiry should have been collected and marshalled in so brief a period. The Committee held hearings on 18 days between November 18 and December 30 of which a verbatim report (referred to hereafter as the Record) is available. In view of the adverse comments which have rightly been made on the conduct of some recent Congressional investigations, it is only fair to say that this Committee earned the compliment paid to it by Mr. Paul Hoffman in the course of his evidence (Record, p. 259):—

> " . . . the spirit with which this inquiry is being conducted, in my opinion, guarantees it is going to have a most constructive result. It would have been possible to conduct an inquiry that would not have had such a result."

The foundations are to be congratulated on the complete answer which they made to the charge that they had " been infiltrated by Communists and Communist sympathisers " and that their funds had " been channeled into the hands of subversive individuals and organisations " (Report, p. 5). Though the Committee records " the ugly unalterable fact that Alger Hiss became the president of the Carnegie Endowment for International Peace," it puts on record that, so far as it could see, he took no official action to further the Communist cause during his period of office (Report, p. 7). It was more difficult to deal with the charge that the foundations had " supported or assisted persons, organizations, and projects which, if not subversive in the extreme sense of that word, tend to weaken or discredit the capitalistic system as it exists in the United States and to favor Marxist socialism " (Report, p. 5). For example, the Rockefeller Foundation came under severe criticism for continuing its grants in aid of the research in Genetics of Professor J. B. S. Haldane after his association with the Communist Party became known to the officers of the Foundation in 1942 (Record, p. 534), even though Mr. Robert Hutchins had pointed out earlier in the proceedings that " there is no necessary correlation between political sagacity and scientific eminence " (Record, p. 297). The

foundations stressed the fact that the areas in the social sciences in which they can today most profitably operate are in a sense controversial and, "in entering these fields, they knowingly invite criticism and thereby assume the calculated risks incident to exploring new fields of knowledge" (Report, p. 10). The Committee qualified its approval of such experiments with the proviso that they must be "conducted with devotion to the American tradition of freedom." Even so the foundations came out of the inquiry on this point with flying colours. The Rockefeller Foundation, for example, has since its creation made 28,753 grants and awarded 5,814 scholarships; of the recipients only two organisations and 31 individuals had been even accused of Communist tendencies (Record, p. 550).

My opinion, after reading the Report and the Record of the evidence, is that, in present circumstances, an American foundation would find it difficult to make a grant to aid the academic work of a person known to be a member of the Communist Party or known to have Communist sympathies because, quite apart from other possible penalties such as loss of public esteem (Record, p. 397), it would run a grave risk of forfeiting its privilege of exemption from federal taxation.[5] The attitude in Great Britain on such matters was made known to the Committee by Mr. Chester Barnard, the former President of the Rockefeller Foundation. In 1948 he asked Mr. Warren Weaver, the Director of the Division of Natural Sciences, to

> ". . . canvass the safe and conservative scientists of Great Britain as to what their attitude would be about either giving support to or withdrawing support from if there was any being given to [*sic*] scientists in Britain who were known to be Communists or affiliated with Communist organisations. . . . The word he brought back was that the British community would regard it as an extraordinary thing if we paid any attention to the political affiliations of anybody in the scientific world in that country." (Record, p. 557).

When Mr. Robert Hutchins argued what might in this context be termed "the British thesis" before the Committee (Record, pp. 291–2), he clearly made no converts.

Though the Committee did have the benefit of the evidence of a representative of the Bureau of Internal Revenue, the "cold war" which seems to exist in Washington between the Executive and Congress resulted in the Committee being unable to obtain an Executive Order permitting it to examine the returns of tax-exempt organisations (Report, p. 2). The U.S. Office of Education, however, did permit Dr. Ernest V. Hollis, Chief of College Administration in the Division of Higher Education, to give evidence, while

[5] It is clear from the evidence of Mr. Norman A. Sugarman, an Assistant Commissioner of Internal Revenue, that any foundation appearing on one of the Attorney-General's list of subversive organisations would lose its tax exemption. (Record, p. 61.)

emphasising that any views on policy which he expressed did not commit the Department. With his help and that of Dr. F. Emerson Andrews of the Russell Sage Foundation, the Committee came to the conclusion that there were approximately 32,500 tax-exempt foundations with a gross endowment of between $6,500,000,000 and $7,000,000,000 (Record, p. 4). In this total there were over 1,000 foundations, whose function it was to make grants, each with a permanent endowment exceeding $50,000; in 1950 the total endowment of these foundations came to $2,600,000,000 and their expenditure was $133,000,000 (Record, p. 21). When these estimates were compiled, the Ford Foundation with declared assets of $502,000,000 (Record, p. 25) was not in full operation so that, for this and other reasons, the present figures must be considerably higher. The development of these grant-giving foundations has been greatly encouraged through the generous tax reliefs in favour of charitable gifts. An individual may, since 1951, claim exemption for charitable gifts up to 20 per cent. of his adjusted gross income; before that date the exemption limit was 15 per cent. (Record, p. 58). The percentage allowed to a corporation has been 5 per cent. since 1936 when the concession was first introduced (Record, p. 27). Dr. Emerson Andrews stated that by 1945 corporate charitable gifts had reached an annual total of $266,000,000 of which 21·2 per cent. (or $56,392,000) went to education (Record, pp. 27 and 32).

The foundations are generally subject to the laws of the states in which they are incorporated and the Federal Government has jurisdiction over them only in so far as they claim exemption from federal taxation for their income and for contributions which individuals and corporations make to them. Naturally, the supervision exercised over charitable foundations varies from state to state but it appears that only in Rhode Island and New Hampshire have any serious steps been taken to compel foundations to register full details of their endowments, their income and their activities (Record, pp. 649 and 790) though, even in these states, the English solution of a supervisory board has been rejected.

The bigger foundations have always taken great trouble to make public details of their activities and financial position : Dr. Vannevar Bush said (Record, p. 155) :—

> " When a foundation receives the privilege of tax exemption, it undertakes an obligation to the public. Certainly, any tax-exempt foundation should so conduct its affairs that they will be for the benefit of the general public.
>
> " Now, I believe that all foundations that are tax-exempt should operate in a goldfish bowl, that they should operate entirely in the open, that they should make complete reports, financial reports, and reports as to the nature of their grants, and so on."

Mr. Russell C. Leffingwell, the Chairman of the Board of Trustees of the Carnegie Corporation of New York, expressed this view even

more graphically when he said that "the foundation should have glass pockets" (Record, p. 380). This practice has not been followed on any substantial scale by smaller foundations and the committee therefore appended to its Report a draft Bill "to provide for public accountability by tax-exempt organisations." If this Bill receives Congressional approval, each organisation claiming tax exemption will have to give annually full information to the Bureau of Internal Revenue about its financial position, including the sources from which it obtained contributions and the grants which it made, and such information (with certain exceptions) will be available to the public.

The role of the foundations in an era when more and more public money is being made available for education and research was naturally discussed by practically all the witnesses. The phrase "risk or venture capital" was applied to the endowment of foundations on many occasions in the course of the investigation and countless instances were adduced of the benefits which had resulted from the willingness and the ability of the foundations to take chances. In the opinion of the Committee, the fact that large sums were available for research from the Federal Government did not mean that the foundations had exhausted their usefulness. On the contrary, the Committee states (Report, p. 4):—

> "Despite the vast sums being poured by Government into the various fields formerly occupied by foundations and into fields in which the foundations and Government are cotenants or at least coadventurers, the need for the basic research so largely supplied and supported by the foundations continues to increase."

Of course, by far the greater part of the research sponsored by the Government, as in the case of that sponsored by industry, is applied research into specific problems. It is interesting to note that Mr. Alfred P. Sloan, Jr., President of the Sloan Foundation and formerly President of General Motors, stressed the fact that the proper place for basic research to be done was in the universities (Record, p. 457).

The recently published Report of the Commission on Financing Higher Education, a body created by the Association of American Universities and financed by grants from the Rockefeller Foundation and the Carnegie Corporation, comes down definitely against any further expansion of direct federal aid to universities (pp. 157–58). The Select Committee, which had its attention drawn to this Report on several occasions (*e.g.*, Record, pp. 118, 175, 176 and 189), made the following important recommendation (Report, p. 13):—

> "That the Ways and Means Committee take cognizance of our finding that the maintenance of private sources of funds is essential to the proper growth of our free schools, colleges, churches, foundations, and other charitable institutions. We

> respectfully suggest that the committee reexamine pertinent tax laws, to the end that they may be so drawn as to encourage the free-enterprise system with its rewards from which private individuals may make gifts to these meritorious institutions."

The case for supporting voluntary agencies by greater tax concessions was summed up by one witness before the Select Committee who said (Record, p. 630) that if private philanthropic ventures closed down for lack of funds, the city, the state or the nation would in most cases have to step in and carry on the service. Since, generally speaking, private voluntary bodies operated more economically and more efficiently than government-controlled agencies, it was a saving in the long run to the community to grant the increased tax concessions needed to keep the voluntary bodies functioning. It is to be hoped that this line of reasoning will commend itself to the British Government and that the same stimulus to charitable giving will be introduced in this country as already operates in the United States and may be further extended as a result of the Report of this Congressional Committee.

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NOTES OF CASES

Unincorporated Members' Club—Liability to Servant Injured on Club Premises—Representative Action to Enforce Claim for Damages for Negligence.

In *Campbell* v. *Thompson* ([1953] 2 W.L.R. 656) the plaintiff was an employee of an unincorporated members' club. While at work on the club premises she slipped on a greasy patch on the stairs and was injured. She therefore brought an action for damages, alleging negligence and breach of duty, wherein she named the honorary secretary and the chairman of the committee as defendants whom she sued "on their own behalf and on behalf of all the other members of the club." No representation order was applied for, under R.S.C., Ord. 16, r. 9, prior to the hearing, but at the trial application was made to the judge for such an order. After hearing argument, Pilcher J. delivered a judgment allowing the order to be made though limited to those persons who were members of the club at the date when the plaintiff sustained her fall.

The scope of the representative action is notoriously uncertain and any judicial pronouncement on this topic is to be greatly welcomed. But with all due deference, a doubt may be entertained as to whether the ruling of Pilcher J. is in line with previous authority, and further as to whether the implications of that ruling may not be more startling than appears at first sight.[1]

It must be borne in mind that there are involved in cases of club liability both questions of substantive law, and of procedure. These two matters are quite distinct though from a practical point of view they may be very closely connected. As regards the substantive issue, since an unincorporated club is not an entity known to the law, and cannot be sued in its own name (*London Association for the Protection of Trade* v. *Greenlands* [1916] A.C. 15), the question is, who is liable for the wrongful act or breach of duty? Depending on the circumstances of the particular case this may be the members of the committee, or some person such as a manager who is in control of the club, or possibly the whole body of members. In the case of torts depending on vicarious liability, apart from the liability of the actual wrongdoer, the question will resolve itself into inquiring whose servant or agent the wrongdoer was at the material time. On the other hand, where liability arises out of the ownership or occupation of property, as in the case of nuisance or under the rule in *Indermaur* v. *Dames*, the proper persons to sue will

[1] For a general examination of the scope of representative actions see the article by the author of this Note, "Actions Instituted by or Against Unincorporated Bodies" in (1949) 12 M.L.R. 409 *et seq.*

normally be the occupiers of the premises in question. If there are trustees in whom the property is vested, they may be the correct persons to sue (subject of course to any right of indemnity they may have against the persons on whose behalf they hold the property [2]); if there are no trustees it must be a question of fact as to who are the occupiers of the premises.

Turning to the procedural question, the need for a representative action will only arise if it is desired to sue the whole body of members. What is important to note however is that it does not follow, because a case for liability can be made out against the members as a matter of substantive law, that this claim can necessarily be pursued by the machinery of a representative action.

The peculiar nature and limitations of a representative action have many times been adverted to. Thus the persons represented in the action are not actually parties thereto and have none of the rights or liabilities of ordinary litigants and the judgment obtained is a representative one and not a personal one, though all the persons represented are in fact bound by it (see *Markt Ltd.* v. *Knight S. S. Co., Ltd.* [1910] 2 K.B. 1021; *Walker* v. *Sur* [1914] 2 K.B. 930). For this reason Ord. 16, r. 9 insists on an *identity* of interest between the parties represented. So far as the defendants are concerned, this means in effect that there must be some community of interest in some subject-matter and that the claims against the various defendants must be identical in the sense that there must not be different defences available to each or any of them. Accordingly it has been repeatedly doubted whether a representative action will lie for a mere claim in damages, whether in contract (*Markt's Case*, *supra*), or in tort (*Mercantile Marine Association* v. *Toms* [1916] 2 K.B. 243; *Hardie* v. *Chiltern* [1928] 1 K.B. 663).[3] For damages is a merely personal remedy and the causes of action against, for example, each member of a club, are mere independent actions for damages deriving from the same or similar sets of circumstances. Hence the representative form of action has hitherto been confined to such claims as actions for a declaration as to rights arising out of a common subject-matter (see, *e.g.*, *Edwards* v. *Halliwell* [1950] 2 All E.R. 1064) or payment of a debt which is sought to be recovered against some common fund vested jointly in the members of an unincorporated society or club, or in trustees on their behalf (*Ideal Films* v. *Richards* [1927] 1 K.B. 374; but *cf. Barker* v. *Allanson* [1937] 1 K.B. 463).

In *Campbell* v. *Thompson*, *supra*, it seems to have been assumed that all the members were joint occupiers of the premises and that

[2] In *Wise* v. *Perpetual Trustee Co.* [1903] A.C. 139, it was held that trustees of a club who were liable under covenants in a lease of which they were trustees, were entitled to be indemnified out of any property of the club, but had no such right against the members personally.

[3] It has been doubted whether a representative action would lie in tort, even if limited to a claim for an injunction: *London Motor Cab Proprietors' Association* v. *20th Century Press*, 34 T.L.R. 69.

on that footing they had such a common interest as would sustain a representation order. It is by no means clear from the report on what evidence the members were treated as joint occupiers, since club premises must often be not in the occupation of the members as such but of the committee or other body or person controlling or managing the club. Even however on the assumption that the members were joint occupiers and thereby had a community of interest in defending the claim, the nature of the claim was still a personal one for damages against each and every member of the club at the material time. In this connection it is noteworthy that the learned judge himself emphasised this aspect of the claim by insisting that the representation order should be confined to the members of the club at the actual date of the accident. Hence if the claim had succeeded [4] it would have involved not a judgment against the common fund of the club itself but a personal judgment against each and every member of the club at the material time.[5] Yet to succeed against each of those members it would be necessary to show negligence against every one of them and that each was liable for the whole of the damage. And it would surely be open to each member to seek to avoid liability by showing that he was not guilty of any personal negligence [6] or, if negligence was imputed to him vicariously, that the actual wrongdoer was not his servant or agent at the material time. The quantum of damage might also vary as between different defendants, at any rate in cases where the foreseeability of certain consequences was relevant to the damages or to specific items of damage recoverable in the action.

The learned judge treated the liability as being one of pure tort although he apparently regarded "the club" as being the employer of the plaintiff as well as being occupier of the club premises. The common law liability of an employer to his employee for the safety of the premises on which the employee is working, appears to arise out of an implied term in the contract of service rather than out of tort (see per Lord Wright in (1951) 67 L.Q.R. at p. 533). It seems very improbable however that the cleaner was the employee of the 2,300 members rather than of the committee or manager who presumably engaged her. And in this latter event the committee or manager would not normally have power to enter into contracts as agent for the members (see *Flemyng* v. *Hector* 2 M. & W. 172; *cf. Bradley Egg Farm* v. *Clifford* [1943] 2 All E.R. 378), and it would always be open to a member to plead that he did

[4] The plaintiff in fact lost, as she failed to establish negligence.

[5] See *Barker* v. *Allanson* [1937] 1 K.B. 463. Note that in *Stone* v. *Bolton* [1951] A.C. 850, the question whether a representative action would lie against the members of the club was never adverted to and it is not clear whether the judgment was regarded as against the members personally or merely against the club funds: *cf.* ((1951) 14 M.L.R. 496).

[6] Thus in the case of liability to an invitee, it would be necessary to show that the occupier knew or ought to have known of the unusual danger. And knowledge or means of knowledge possessed by one joint occupier would not necessarily be imputable to other joint occupiers.

not authorise the making of the contract (*cf. Steele* v. *Gourley*, 3 T.L.R. 772; *Draper* v. *Manvers*, 9 T.L.R. 73).

The remarkable implications of this decision are sufficiently indicated by bearing in mind that the persons represented are not parties to and take no part in the litigation. Hence a member of a club who was abroad at the material time and knew nothing of the action at any stage might find himself saddled with a personal judgment for a heavy sum by way of damages in a claim which he has had no opportunity to defend. Moreover the decision seems to ignore the practical results of a judgment against the defendants. For although it is a personal judgment against each and every one of them, not one of these, except the representative defendants, is named on the record, and it is far from clear what machinery for executing the judgment might be invoked, or how disputes are to be resolved as to the identity of the members and their membership at the material time. In partnership law, since a judgment against the firm is a judgment against all the partners individually, a special procedure exists for enforcing such a judgment personally against the individual partners (R.S.C., Ord. 48A, r. 8). No comparable rules exist in regard to unincorporated associations under Ord. 16, r. 9, and for the very good reason no doubt that it was never contemplated that a judgment obtained thereunder could result in the execution of a judgment for damages against the parties represented in their personal capacity. In the words of Buckley L.J., in *Walker* v. *Sur* [1914] 2 K.B. at p. 936: "It is simply an action of debt against a large number of individuals and no judgment could be obtained which would be representative against all of them; there could only be a judgment individually against each of them."

It may be said that this is an instance of hard cases making bad law. In the course of the argument Pilcher J. observed to counsel for the plaintiff, that "the law should not require you to make 2,300 people defendants." (See *The Times*, March 4, 1953). It may well be however that, as a matter of substantive law, liability in such a case as the present could be fixed on the committee or some other body or person in control of the club premises without the need for a representative action against the whole body of members. It does not appear from the report whether there were any trustees, but even if there were none it is not clear why the plaintiff preferred to sue all the members rather than the committee. In this connection the case of *Brown* v. *Lewis* ((1896) 12 T.L.R. 455)[7] seems to point the way. Alternatively the plaintiff might have sued certain of the members as joint occupiers in their personal capacity leaving them to claim any indemnity or contribution to which they

[7] In *Brown* v. *Lewis* the action began in a representative form against the members, but leave to amend by joining the members of the committee personally was given during the hearing and judgment was given against the committee personally as being the persons primarily liable.

might have been entitled from the other members. And lastly there remained the possibility of suing the person or body that engaged the plaintiff as being her employer at the material time.

This case emphasises once again the unsatisfactory position in regard to the liability of the members of an unincorporated club whether arising out of contract or tort. In principle the only effective way out of the impasse would be to allow an action against an unincorporated society to be brought in the name of the society in any case where as a matter of substantive law the body of members might be held liable, any judgment so obtained to be enforceable only against the common fund or other joint property of the society. Such a judgment might be obtainable without prejudice to any liability established against any individual joined in the action (or sued separately) in his personal capacity. This result could of course only now be achieved by legislation.

DENNIS LLOYD.

THE DEFECTIVE MARRIAGE—AND THE CHILD

IF a wife, after threatening to petition for annulment of her marriage on the grounds of her husband's incapacity, unsuccessfully pursues to the Divisional Court a complaint of desertion and persistent cruelty against him under the Summary Jurisdiction (Separation and Maintenance) Acts, she cannot then go back and have the marriage annulled because of his incapacity. Such was the decision of the Court of Appeal (of Singleton, Birkett and Morris L.JJ.) in *Tindall* v. *Tindall* [1953] 1 All E.R. 139, and it is submitted that the common sense of ordinary people would heartily agree, with perhaps a murmuring disapproval of such a wife's ability to compel her husband to lodge £15 security for the costs of her appeal in the Divisional Court, with little chance of its recovery.

But where approbation of a marriage is less emphatic, and a child is concerned, questions of greater delicacy may arise. In *Slater* v. *Slater* [1953] 1 All E.R. 246 (more fully reported in [1953] P. 63) the wife knew before the marriage of doubts entertained by her husband's doctor about his procreative ability. Three years later, in early 1948, she was upset to hear from another doctor that the marriage had not been consummated, but told her husband that she wanted not a "divorce" but a child. In April of the following year they took charge of a boy of 2 whom they officially adopted in September, and at precisely this time the wife also fruitlessly underwent artificial insemination treatment from a donor. Almost immediately after the adoption order she had a nervous breakdown and received institutional care. In November, 1949, after some conversation with a medical attendant during which she spoke of contemplating "divorcing" her husband for incapacity, she returned home, but not until February, 1951, did she take legal advice and learn that her possible remedy was nullity and not

divorce. It seems to have been her husband's conviction for a crime involving dishonesty shortly afterwards that finally decided her to leave him and petition for nullity, and the same Court of Appeal that had decided *Tindall* v. *Tindall* held, reversing Karminski J., that she was entitled to a decree. Singleton L.J., who delivered the judgment of the court, found that she did not know of her legal remedy until November, 1949, and distinguished *W.* v. *W.* [1952] P. 152, on the grounds that here : " if . . . the wife petitioner did not know that she had a remedy for the wrong done to her, the adoption of the child did not amount to approbation of the marriage, nor had anything else up to November, 1949, any such effect."

The practical result achieved by the decision is probably desirable; both parties appear likely to be less unhappy unmarried than married to each other, and the hapless adopted child may, it is to be hoped, be placed in the care of those more interested in the happiness of another than in the contemplation of their own neuroses. The sole reference to him in the report is Somervell L.J.'s statement that in 1949 the wife was " still anxious to do what was right towards the husband and towards the child they had adopted," though she seems to have left him for five months in 1950 to stay with relatives in Gibraltar.

But the means by which this result was attained seem more open to doubt. Surely, on general grounds, this case savours more of the marriage that has completely broken down than of one that never started? And more narrowly, not only is there here a finding of *ignorantia juris excusat* (all the facts were known), but even the ignorance was both incomplete (since in 1948 the wife was talking to her husband about " divorce ") and unnecessary (since solicitors flourish in every town, and the wife was eventually put on the right lines by the Citizens' Advice Bureau).

It was Denning L.J., sitting with Somervell and Hodson L.JJ., who, with his customary interest in the effect of court decisions, and an instinct for the *mores* of the times, concentrated attention in *Wiseman* v. *Wiseman* [1953] 1 All E.R. 601, on the effect on the child of a void marriage. It is submitted, alas, that in the present state of the law his contention that such a child may yet be legitimate cannot be substantiated. In this case a wife was allowed to appeal out of time against a decree nisi granted to her husband, and the decree was set aside, because she had had no notice of the proceedings, and the husband's failure to make " a sufficient or candid " disclosure in applying for substituted service was held to render that order voidable. The fact that in the meantime the husband had remarried and a child had been born of that remarriage was held not to debar the court from setting aside the decree absolute. Denning L.J., towards the end of his judgment, said : " I do not think that this avoidance will relate back so as to render the child illegitimate. The child was legitimate when born,

and the doctrine of relation back has never been applied so as to render unlawful that which was originally lawful." For this proposition he cited an authority on a landlord's right to mesne profits on re-entry after a breach of contract, and continued: "When a marriage which is voidable is avoided, the avoidance as a rule only speaks from its date. It does not relate back to the beginning." As authority for this he quoted two cases to the effect that a decree of nullity in a voidable marriage does not automatically invalidate a previous separation agreement, but he did not refer to *Dredge* v. *Dredge* [1947] 1 All E.R. 29, which established (until statute intervened) that the child of a voidable marriage was retrospectively bastardised on annulment. Moreover, the argument was irrelevant since there was here no voidable, but a void marriage. The Lord Justice continued: "It was suggested in the artificial insemination case, *L.* v. *L.* [1949] P. 211, that the child of a voidable marriage may, on its avoidance, become illegitimate. That is not good law as it has been overruled by section 4 of the Law Reform (Miscellaneous Provisions) Act, 1949." Here the distinction between the void and the voidable marriage becomes crucial, because the statutory provision (now the Matrimonial Causes Act, 1950, s. 9) reads: "Where a decree of nullity is granted in respect of a voidable marriage, any child. . . ." In *Wiseman* v. *Wiseman* there was no decree of nullity of the second marriage; as Denning L.J. himself said, once the decree of dissolution of the first marriage was set aside, the second marriage automatically became void (under the doctrine of *De Reneville* v. *De Reneville* [1948] P. 100). The effect of the statutory provision is, furthermore, expressly limited to the children of voidable marriages.

The conclusion, unsavoury but apparently inescapable, seems to be that with all their skill and valour, the judges who seriously consider the effect of their judgments on society have not, so far, discovered any adequate means of protecting the children of such marriages. The legislature, while demonstrating in 1949 that determination finds no obstacle in parliamentary shortage of time, grasped only half the nettle. Why was the traditional distinction between the void and the voidable marriage retained? In the present case, for example, the second wife, to be sure of her position (and, even more important, that of her future child), should, before marrying a divorced man, have inquired (1) whether his petition for dissolution of the previous marriage had been defended, and (2) if not, whether notice had been properly served. The insistence on such an inquest into old unhappy things contrasts strangely with the law's benevolence, in *Slater* v. *Slater*, towards unnecessary ignorance about future possibilities. Even apart from the present case, do not children of some other cases of inadvertent bigamy call for protection?

If, as seems probable, only the legislature can now remedy the situation. surely an Act to render legitimate the children of

void marriages, at least one party to which honestly and reasonably believed the marriage to be valid, is now overdue and should be most insistently demanded.

O. M. Stone.

The Penhas Case: Mixed and Unmixed Marriage in Singapore

In February of this year Lord Oaksey delivered judgment in Privy Council Appeal No. 21 of 1951, a case which is due to go down in legal history, at least in Singapore, as the *Penhas Case*.[1] The Privy Council, in dismissing the appeal of Isaac Penhas from a Singapore High Court judgment, found that the appellant's late brother, Abraham, a Jew of Iraqi origin, domiciled in Singapore and a naturalised British subject, had contracted a valid marriage, dating from the end of 1937, with a Chinese woman, Tan Soo Eng, a British subject domiciled in Singapore. The judgment makes it possible for Tan Soo Eng to apply for letters of administration of Abraham Penhas's estate as his widow.

The marriage came about in the following manner: Abraham Penhas, having been refused permission by his father, a well-to-do business man, to marry a Jewess whom he had met in England in 1936 (he was then 39 years of age), in the next year employed a Eurasian woman in Singapore to find him a wife. As a result, he was introduced to Tan Soo Eng, a widow, and her mother. It was finally settled that a wedding ceremony would be held in December, 1937, "according to Chinese rites." The marriage could not take place in a synagogue; Tan Soo Eng was not at that time a Christian, and the Christian marriage legislation did not, therefore, apply; some sort of a Chinese ceremony seems to have been hit upon as a way of performing a rite of marriage. A few days before Christmas, friends and relatives of the bride gathered in the house which she had rented with the money supplied for that purpose by Penhas, who himself arrived accompanied by a Chinese gentleman and two Jewish friends. The Chinese gentleman conducted the ceremony.

> "We stood before him. We worshipped the Heavenly God and I worshipped with Joss Sticks and he asked us each separately whether we were willing to be man and wife, and we both said 'Yes.' Deceased put a handkerchief over his head while I worshipped. . . . Deceased told me it was their custom to put a handkerchief on the head. He raised his right hand the whole time while I was worshipping. I was murmuring a prayer to Heaven for long life. I could not understand what he was murmuring, it was in his language. After worshipping, his two Jewish friends shook hands with me and deceased also shook hands with me and kissed me."

The couple then went to pay their respects, in Chinese fashion, to the bride's mother, and the ceremony ended with a feast and a final blessing from the Chinese gentleman brought by the groom.

[1] *Isaac Penhas* v. *Tan Soo Eng* [1953] A.C. 304.

In this ceremony we have a fascinating example of the mingling of nuptial elements in a polyglot and multicultural colony. On the face of it, it might seem a matrilocal Chinese wedding augmented by a few Hebraicisms. But the mixture of things Jewish and Chinese is legally only of marginal interest, for it is the consensus which the ceremony implies, taken together with the subsequent cohabitation until Penhas's death at the hands of the Japanese in 1942, and the raising of two children of the union—baptised as Christians to add to the colourful compromise of cultures—which has made this a good marriage in law. The appellant denied the possibility of cohabitation (saying that normally Penhas did not sleep away from his father's house), and alleged that nothing was known of the union to the deceased's own family. The courts, however, have found a valid marriage, applying the doctrine of common law marriage.

In Singapore there are special legal provisions for the marriage of Muslims (Malays, Indians, and Arabs) and Christians (of many ethnic groups). Civil marriage legislation has been in force only since 1941. A long series of cases has established that the Chinese are polygamous and that customary forms of marriage, for both primary and secondary wives, have legal validity, although there has been much debate about the nature of these customary forms. Furthermore, the courts have recognised the possibility of non-Chinese women (even Christian, it has been argued) marrying Chinese men by Chinese forms as secondary wives. Apart from *Carolis De Silva* v. *Tim Kim* (1902), which is a Selangor (one of the Malay States) case, there appears to be no record of a ruling on the possibility of a Chinese marriage between a Chinese woman and a non-Chinese man. The Selangor marriage was upheld on the grounds of intention, cohabitation, and repute. As far as the Colony of Singapore is concerned, the *Penhas Case* shows for the first time the ability of persons of different religious and cultural backgrounds to enter into valid marriage together on the basis of common law marriage principles.

However, although the judgment in this case relates to a mixed marriage and, as a result, may seem to have prime significance for other inter-ethnic unions in the colony which are not formed under legislated provisions, it may be said that the application of the concept of the common law marriage has just as much relevance for marriage between Chinese and Chinese. Certainly, recent judgments locating marriage in the realm of consensus must have an important bearing on the old problem of the Chinese secondary wife or concubine. Up to 1949, it would seem, it was usual for the Colonial courts, when they were called upon to decide whether a Chinese woman was or was not a secondary wife, to apply the three tests of intention, cohabitation, and repute. For example, in 1947 in Penang (which has the same legal background as Singapore) Carey J. refused to find a marriage where the woman claimed to be the

wife of a deceased Chinese. Cohabitation and intention to form a more or less permanent union appeared to be established, but the judge could not satisfy himself that there was repute. (*Tan Ah Bee* v. *Foo Koon Thye and Another*, Law Reports of the Malayan Union, 1947.) Yet in June, 1949, contemporaneously with the *Penhas Case* in the Singapore High Court, Murray-Aynsley C.J. in Singapore found a Chinese secondary marriage simply on the basis of consensus, invoking the English concept of the common law marriage.

> "*Held*, . . . that for the legal requirements of a marriage with a *t'sai* [principal wife] or a *t'sip* [secondary wife], the law of the Colony merely requires a consensual marriage, that is, an agreement to form a relationship that comes within the English definition of marriage . . . ; that the requirements of a ceremony, of a formal contract and of repute of marriage are evidentiary only and not essential to the acquisition of the status of a *t'sip*. . . ." (*Er Gek Cheng* v. *Ho Ying Seng*, The Singapore Law Reports, 1949.)

The doctrine of common law marriage was applied in the *Penhas Case*, but their Lordships' judgment in the Privy Council, while finding that the ceremony performed "was indubitably intended by the parties to constitute a valid marriage," admitted the possibility of doubt on the question whether the marriage so intended was "a common law monogamous marriage or a Chinese polygamous marriage." However, their Lordships held that "the evidence as it stands sufficiently proves a common law monogamous marriage." One of the implications of this seems to be that arguments in the Singapore courts that the doctrine of the common law marriage ought to be applied to Chinese secondary marriages may have to face the objection that the common law marriage enshrines monogamy. However, it seems unlikely that there will be a retreat from Murray-Aynsley C.J.'s position and probable that Chinese secondary marriages will henceforth be judged in terms of consensus. This is not Chinese law; far from it. It is not English law. But it is law made by English judges struggling with the problem of adapting the law of England, as it was at the time of its importation into the Colony, to the needs of a non-European population. Of the 1807 Charter of Justice the first Recorder of Penang said that it

> ". . . secures to all the native subjects the free exercise of their religion, indulges them in all their prejudices, pays the most scrupulous attention to their ancient usages and habits."

A century and a half later one of the ancient usages and habits of the natives of England takes its place, somewhat incongruously it may be thought, in the law of the Colony of Singapore.

MAURICE FREEDMAN.

SELF-SERVICE SHOPS AND THE LAW OF CONTRACT

THE decision of the Court of Appeal in *Pharmaceutical Society of Great Britain* v. *Boots* [1953] 1 Q.B. 401, affirming the judgment of Lord Goddard C.J. [1952] 2 Q.B. 795, provides welcome authority for the familiar and elementary proposition that a display of goods in a shop is not an offer but only an invitation to treat. But in extending this proposition to self-service shops it has been endowed with an unfortunate element of rigidity.

The case arose under section 18 (1) (*a*) (iii) of the Pharmacy and Poisons Act, 1933, which makes it unlawful to sell certain poisons unless the sale is effected by or under the supervision of a registered pharmacist. Boots, at one of their branches, had adopted a self-service system so that a customer could there help himself to goods, including poisons covered by the Act, which were displayed on shelves with a conspicuous indication of the price. The customer was then required to take his purchases to the cash desk by the door, where a qualified pharmacist was in attendance scrutinising and supervising each purchase. The plaintiffs maintained that this practice violated the Act since the registered pharmacist could intervene only after the sale had been effected. Self-service sales, in their opinion, differed from those through shop assistants in that the offer to sell was made by displaying the goods and was accepted by a customer as soon as he had selected the goods and before he appeared at the cash desk. Lord Goddard rejected this argument. "It is a well-established principle," he said, "that the mere exposure of goods for sale by a shopkeeper indicates to the public that he is willing to treat but does not amount to an offer to sell. I do not think I ought to hold that that principle is completely reversed merely because there is a self-service scheme, such as this, in operation." Consequently he gave judgment for the defendants.

Whether a display of goods amounts to an invitation to treat or to an offer must depend upon the intention of the shopkeeper, and the principal reason for assuming that shop window displays are intended only as invitations to negotiate is that there might be a larger number of customers willing to buy than the shopkeeper would be able to supply. This was explained by Lord Herschell in *Grainger and Son* v. *Gough* [1896] A.C. 325, although that case was concerned with an advertisement by catalogue rather than by window display. The situation is clearly different where goods are displayed in bulk on the counter or shelves of a shop, since the offer disappears when the last item of stock has been sold. Lord Herschell's argument would, therefore, justify different treatment of a display of a sample in a shop window or show case and of a display of stock on the counter or shelves. But Lord Goddard refused to draw this distinction. It would mean that "on the customer picking up the article the property would forthwith pass

to him and he would be able to insist upon the shopkeeper allowing him to take it away, though in some particular cases the shopkeeper might think that very undesirable. On the other hand, if a customer had picked up an article, he would never be able to change his mind and to put it back." This, as Romer L.J. added, would quickly destroy the popularity of these shops.

But, with respect, it cannot be said that because a display is considered to be an offer a customer must be treated as having bought an article as soon as he has picked it up. Although an offer can be accepted by conduct, the offeree's action must clearly and finally demonstrate the intention to accept as, for instance, the act of boarding a bus, or inserting a coin in an automatic ticket machine. The picking up of an article displayed is capable of many explanations, and whatever view be taken of the meaning of the display the customer should always be free to explain that he had picked up the article merely to examine it, or that he had taken it reserving the right to put it back and substitute another article for it.

It must also be remembered that the customer would not be able to take the article away before he had paid for it. "Passing of the property and right to possession are two different things," as was shown by Hallett J. in *Dennant* v. *Skinner* [1948] 2 K.B. 164. A similar confusion of the making of a contract and its performance appears in Lord Goddard's statement that since the offer to buy is made by the customer "there is no sale effected until the buyer's offer to buy is accepted by the acceptance of the price."

It is, of course, true that the shopkeeper would not be able to prevent the acquisition of goods by undesirable customers although he might wish, and in the case of poisons he ought to be able, to prevent this. But it is begging the question to assert that he has done what he ought to do, just because he ought to do it.

The intention implied in a display of goods can be ascertained by putting the question in terms of freedom of contract, the right of the shopkeeper to refuse a customer. When Baron Parke in *Timothy* v. *Simpson* (1834) 6 C. & P. 499 at p. 580, insisted that a shopkeeper could refuse to sell goods advertised in the window and could turn out a customer who insisted on buying them, he clearly vindicated the shopkeeper's freedom of contract. More recently, Sir Percy Winfield has asserted that "a shop is a place for bargaining, not for compulsory sales." [1]

Bargaining in the full sense of the word does not take place in most shops and compulsory sales have now become common to an extent which would have alarmed Baron Parke. Thus there can be little doubt that a shopkeeper cannot refuse to sell rationed goods, certainly not to a customer registered with him. The context of rationing explains Lord Chief Justice Caldecote's remark in

[1] Winfield, "Some Aspects of Offer and Acceptance," 55 L.Q.R. 499, at p. 518.

Wiles v. *Maddison* [1943] 1 All E.R. 315 at p. 317, that "a person might be convicted of making an offer of an article of food at too high a price by putting it in his shop window to be sold at an excessive price." Many people will sympathise with the customer, in the case before Baron Parke, who was turned away arbitrarily and not very politely, and there is an even stronger feeling of resentment against the practice of selling commodities in short supply to specially favoured customers from "under the counter." Restrictions of the freedom of contract of shopkeepers are, therefore, supported by opinion even beyond the extent to which they have been established in law.

But freedom of contract cannot be curtailed only by legislation, it can also be surrendered voluntarily. Thus, where contracts are made through automatic machines, the power to turn away customers is lost and the parties may reverse the character of offeror and offeree. There is some doubt as to whether it is the passenger or the owners of the railway who make the offer when a ticket is sold at a booking office.[2] But where a ticket is obtained from an automatic machine and generally where goods are sold through automatic machines, it is certain that it is the act of putting the coin into the machine which "is the acceptance of a standing offer made by the owner of the machine."[3]

It might be argued that these cases are distinguishable from self-service shops since in the case of machines not only the selection of the goods but also payment are made without the agency of an assistant. But this argument again confuses the elementary distinction between entering into a contract and performing it. The fallacy of this argument is, moreover, clearly demonstrated by *Chapelton* v. *Barry U.D.C.* [1940] 1 K.B. 532. Slesser L.J. there explained that the placing of a pile of deckchairs so that the public could help themselves to them constituted an offer. The institution of self-service in that case thus involved loss of the right to turn away customers, even although collectors were employed to receive payment, and the situation, it is submitted, is indistinguishable from self-service shops. This system is adopted because it is thought to possess advantages over more orthodox trading methods, such as economy in overheads, and a general increase in efficiency and productivity.[4] To secure these important commercial benefits a merchant might well be willing to surrender his freedom to refuse customers.

But the right to surrender the freedom of choosing one's

[2] *Denton* v. *G. N. Ry.* (1856) 5 El. & Bl. 860 implies, as was pointed out in the dissenting judgment of Crompton J., that a display in a shop window must be considered to be an offer. It would also be difficult to resist this conclusion if *Warlow* v. *Harrison* (1855) 1 E. & E. 295, is supported.

[3] *Pollock on Contract*, 13th ed., p. 9.

[4] See the Report of the Anglo-American Council on Productivity, discussed in *The Times* newspaper of November 5, 1952, and *The Observer* of November 9, 1952.

customers is subject to limitations as much as freedom of contract in general. Such limitations, depriving a merchant of the right to surrender his freedom of choice, appear when retail sales are controlled by legislation. The control of the sale of intoxicants by the Licensing Laws compels publicans to retain the power to refuse customers. It would certainly be difficult to operate the self-service system in public-houses, or to employ it for the sale of rationed goods. It is true that the poisons with which the decision in *Pharmaceutical Society of Great Britain* v. *Boots* was concerned were not dangerous so that there might be no immediate risk in allowing free access to them. On the other hand, a customer might consume any poison which he had selected before coming to the door to pay for it, just as in some self-service restaurants the customer consumes his food before he pays for it. If this possibility was contemplated and approved by the Poisons Act it seems difficult to understand why this Act, in section 22, should have forbidden the sale even of non-dangerous poisons by automatic machines, or why indeed there should be any control over the sale of non-dangerous poisons.

If effect is to be given to the control instituted by this Act, the self-service system should not be allowed to operate in the case of poisons covered by the Act; or, at least, it should be necessary to exhibit prominently a notice warning customers that the goods displayed on the shelves of the chemist's department could be acquired by them only after they had submitted their selection to the pharmacist in attendance for inspection.

J. Unger.

Illegal Performance of Contract

There is authority, both old and new, for describing as illegal a contract which though legal in its inception has been performed in an illegal manner by one of the parties. Thus, in 1822, Best J. stated that where a contract is illegally performed "there is no legal contract" (*Bensley* v. *Bignold*, 5 B. & Ald. 335, 342); and a century later in *Anderson* v. *Daniel* [1924] 1 K.B. 138, where a fertiliser was delivered without the invoice required by statute, Bankes L.J. concluded that "the contract of sale is illegal," and Scrutton L.J. expressly agreed with him.[1] Although Bankes L.J. there admitted that it was unnecessary to decide whether the contract was illegal *ab initio*, and both Scrutton and Atkin L.JJ. emphasised that it was the performance that was illegal, the traditional terminology was once more employed in *B. & B.*

[1] This view of the effect of a failure to deliver the invoice required by the Fertilisers, etc., Act, 1920, was accepted by the parliamentary draftsman on the occasion of the amendment of that Act, for s. 1 (2) of the amending Act of 1926 expressly provides that such failure "shall not invalidate a contract of sale."

Viennese Fashions v. *Losane* [1952] 1 All E.R. 909, where Evershed M.R. held that a similar failure to deliver a statutory invoice "tainted the contract" (pp. 912 F, G, 913 A), a conclusion reached also (p. 913 B) by Jenkins L.J., who stated that the illegal performance "sufficed to turn it into an illegal contract" (p. 913 G), so that "that course of events must taint the whole contract with illegality" (p. 914). In the light of these dicta it may therefore be suggested with respect that not the least merit of the judgments delivered in the Court of Appeal in *Marles* v. *Trant*, *MacKinnon Third Party* [1953] 2 W.L.R. 564, is a new-found accuracy of terminology, for emphasis is laid in all three judgments upon the fact that where such statutory invoice is lacking the contract itself is and remains legal, the illegality being confined to the performance: see *per* Singleton L.J. at p. 569; Denning L.J. at pp. 570–1; and Hodson L.J. (diss.) at p. 575. In view of the number of occasions upon which delivery of goods must today be accompanied by an invoice or similar document, it is a matter for congratulation that the courts have at last reached the position stated by Pollock (*Contracts*, 13th ed., p. 346) in the words: "The fact that unlawful means are used in performing an agreement which is prima facie lawful and capable of being lawfully performed does not of itself make an agreement unlawful."

In *Marles* v. *Trant*, however, the court's unanimity in the matter of terminology did not extend to the conclusion reached. The plaintiff having recovered damages from the defendants for loss arising from their misdescription of seed which they had sold him, the defendants claimed an indemnity from the third party who had supplied them with the seed under the same misdescription, but Lynskey J. rejected this claim on the ground that it could not be established without proof that they had illegally delivered the seed (to the plaintiff) unaccompanied by the particulars required by the Seeds Act, 1920. It is clear that the defendants' cause of action against the third party did not require reference to this illegality and that they were entitled to at least nominal damages. But were they entitled to more? Their claim as pleaded was for special damages arising from the resale, and Hodson L.J. concluded that they could not otherwise "prove their damages when those damages are to be measured by reference to a contract illegally performed by them." To this, several answers were vouchsafed, but the measure of reliance placed upon each by the majority of the court is not clear.

(i) It was suggested that the defendants were not required to refer to the sub-contract, in that, by S. G. A., s. 53 (2) they were entitled to the estimated loss directly and naturally resulting from the third party's misrepresentation and, since a resale was within the contemplation of both parties, damages must be assessed on the basis of the loss which would flow from such contemplated eventuality. Singleton L.J. rejected this claim for general damages

on the ground that it was not put forward at the trial. But would it have succeeded had it been properly pleaded? It would appear not. Singleton L.J., relying on a dictum of Devlin J. in *Biggin* v. *Permanite* [1951] 1 K.B. 422, 436, suggested that where a resale has actually occurred damages cannot be claimed without reference to the resale which has in fact taken place; while Hodson L.J. rejected the claim for general damages (at p. 576) on the ground that "this would enable the defendants to reach by a circuitous route the goal from which they are barred by the illegal performance of their contract." It would appear, therefore, that, notwithstanding Singleton L.J.'s remark that "the third party had nothing to do with the contract between the plaintiff and the defendants," all members of the court accepted Denning L.J.'s conclusion (at p. 571) that the defendants had to prove their contract with the plaintiff.

(ii) It was suggested that the defendants' claim did not, however, require a reference to the illegality in their performance of the sub-contract. Hodson L.J. admits that the illegality was "in a sense irrelevant," while Denning L.J. remarks that it did not make "any practical difference"; but it is Singleton L.J. who appears to make this his *ratio decidendi*, for he concluded that "unless either (1) the contract was an illegal contract, or (2) the damage resulted from the omission" [to supply the statutory particulars] such illegality was irrelevant, so that where, as here, the loss incurred had nothing to do with the illegality, the illegality may be ignored.

(iii) The conclusion reached by Denning L.J. goes further, for the learned Lord Justice decided that, even if a reference to the sub-contract and to its illegal performance were required, the defendants' lack of culpability would prevent the operation of the maxim *ex turpi causa non oritur actio*, for this was a case "where a man can be guilty of a crime without any moral culpability at all," so that it could not be said that he was "seeking to get reparation for the consequences of his own culpable crime."

The decision reached in *Marles* v. *Trant* may be welcomed, "because," to borrow the words of Hullock B. in *Tyson* v. *Thomas* (1825) McCl. & Y. 119, 128, "at the least, the [third party's] defence does not seem founded on a very nice feeling"; but, as Singleton L.J. ignored the defendants' illegality on the ground that it was non-productive, while Denning L.J. rejected it on the ground that it was non-culpable, it is perhaps idle to speculate upon what *ratio decidendi* will eventually be attributed to the case.

J. A. Coutts.

Hire-Purchase Agreements and Penalties

That by-blow of the Factors and Bills of Sale Acts, the modern hire-purchase agreement, usually contains a minimum hiring clause

requiring the hirer to pay not less than a certain proportion of the total hire, notwithstanding return of the goods before such an amount has become due as instalments; the goods may be returned on the hirer's volition, or may be repossessed by the owner, and the latter act may be authorised under the agreement on an event (such as the death of the hirer) which is legally neutral, or an event (such as failure to pay hire) which is a breach of the agreement. The Court of Appeal has previously held that when the clause operates on an event not constituting a breach of the agreement, it is unaffected by the equitable doctrine of penalties; *Assoc. Distribs., Ltd.* v. *Hall* [1938] 2 K.B. 83. It has now held in *Cooden Engineering Co., Ltd.* v. *Stanford* [1953] 1 Q.B. 86 (Jenkins L.J. diss.) that when operating on a breach, minimum hiring clauses *do* come within the scope of the penalties doctrine; the clause in question was held to be unenforceable because it required an unreasonably large payment. This decision gives your Australian correspondent subdued satisfaction, because it upholds a view strongly pressed by him in an article in (1936) 10 *Australian Law Journal* 167. On the authorities then available (reported chiefly in textbooks on hire-purchase law and nowhere else) the view was somewhat heretical, and the opposing view was argued with equal vigour by your correspondent's colleague at the Victorian bar, Mr. R. L. Gilbert, in 12 *Australian Law Journal*, at pp. 139, 198. It is a pity that the researches of counsel and court on the *Cooden Engineering Case* did not extend to these articles, which raised questions of legal history and social policy not adverted to by the Court of Appeal. Your correspondent's satisfaction is subdued because this has ceased to be an active issue in Australia, where legislation of the six states has long since made minimum hiring clauses unenforceable and given the courts a degree of control over the operation of hire-purchase agreements comparable with that which the Court of Chancery established over mortgages. The English Hire Purchase Agreements Act, 1938, ss. 4 and 5, likewise operates to protect hirers against the effect of minimum hiring clauses, but section 1 inscrutably restricts the protection to agreements concerning goods of limited value—in the case of motor-vehicles, £50 and under. The six Australian Acts, besides putting no monetary limit on their application, provide a bewildering variety of protections for hirers and even a few for owners. Perhaps the most absurd extremes of tenderness (intended to benefit hirers, though just as likely to benefit owners) is that in the Queensland Act of 1933, s. 15, requiring hearings to be *in camera*, unless otherwise ordered by the court. But without going to such extremes, the Mother of Parliaments might well adopt some of the Australian provisions, and should certainly consider abolishing the limitations of the 1938 Act, or at least bringing them into line with the march of inflation. The Australian Acts are titled "Hire-Purchase Agreements Acts" and can readily be discovered by consulting the

cumulative alphabetical tables of Acts in force which appear in the annual volumes of all the state statutes, excepting those of Tasmania. The latter state's volumes do not provide this handy reference; the relevant Act there is 1943–44, p. 209.

GEOFFREY SAWER.

MASTER'S LIABILITY TO SERVANT'S WIFE FOR INJURY DUE TO SERVANT'S NEGLIGENCE

THE problem which was before the Court of Appeal (Singleton, Denning and Hodson L.JJ.) in *Broom* v. *Morgan* [1953] 1 Q.B. 597, can be summarised in one sentence: Is the employer of a married man liable to the man's wife for the husband's negligence in the course of his employment? The court, affirming Lord Goddard C.J. [1952] 2 All E.R. 1007, answered the question in the affirmative. This decision will undoubtedly meet with general approval. Oddly enough, there was only one English precedent, *Smith* v. *Moss* [1940] 1 K.B. 424, a very short judgment of Charles J. who arrived at the same result. In the circumstances, the court relied much on American and Australian authorities.

Such difficulties as arise in connection with the instant case are not to be found in the realm of legal policy, but at the lower level of legal technique. By section 12 of the Married Women's Property Act, 1882, "no husband or wife shall be able to sue the other for a tort." Where is the flaw in a chain of reasoning which consists of these links:

(1) a master is liable for his servant's conduct in the course of his employment only if the servant himself is liable therefor as a tort;
(2) a man cannot be liable to his wife in tort;
(3) hence the master cannot be liable for a tort committed by the servant against his wife?

Lord Goddard C.J., decided the case on the ground that the first of these propositions was wrong, and the three members of the Court of Appeal agreed with him. The wrongly so-called "vicarious" liability of the master is not a liability imposed upon X for the tort of Y. As Denning L.J. said, it is not "a substituted liability whereby a person who is not morally answerable is made responsible for the liability of another. . . . The reason for the master's liability . . . is the sound moral reason that the servant is doing the master's business, and it is the duty of the master to see that his business is properly and carefully done." Although sometimes (not always) the master's liability hinges upon the negligence of the servant, that liability is, since the master cannot exculpate himself by pleading his own diligence, in fact a species of strict liability, and, as Lord Goddard pointed out, comparable to that of the owner of dangerous things. The employer of a servant creates a risk that the servant may do harm in the

course of his employment. For this risk he is liable. This view is in accordance with Holmes' historical analysis in the First Chapter of *The Common Law*.

To make the master liable it is enough that the servant has acted negligently in the course of his employment, whether or not, in doing so, he committed a tort. " Acting negligently " in this context means acting carelessly in violation of a moral duty recognised by law, although, as in the present case, the law may refuse to attach to this recognition the sanction of delictual liability. The servant owed to his wife the same moral duty to be careful that he owed to everyone else or even, as Singleton L.J. thought, a special duty in virtue of his common law liability of maintenance. Hodson L.J. emphasised that the absence of substantive liability did not mean that the husband was not " in breach of duty." Duty which is predicated upon a moral norm recognised by law is different from liability which is one form of sanction the law may attach to the norm. The absence of this sanction does not indicate the absence of the norm, and negligence is a concept which transcends the law of tort. On the other hand, however, such liability may exist although the law of procedure prohibits its enforcement through a particular kind of action. The classification of rules concerning liability as " procedural " or " remedial " is apt to lead to injustice and to confusion as students of the conflict of laws know only too well from cases such as *Machado* v. *Fontes* [1897] 2 Q.B. 231.

The line of reasoning which was the basis of the decision of the Lord Chief Justice and approved by the Court of Appeal was thus a clarification of the master's liability for the servant's negligence (and, incidentally, an important contribution to analytical jurisprudence). It was sufficient to support the decision. If the first of the three propositions stated above is wrong, the employer is liable whether or not the second proposition is right, *i.e.*, whether or not, as a matter of substantive law, the servant can commit a tort against his wife. The decision itself is compatible with the view that the spouses are not only precluded from suing one another in tort, but that, as a result of the survival of the " unity " rule, they cannot be mutually liable in tort. Indeed, Lord Goddard and Hodson L.J. were explicit on the point that the substantive immunity or disability had survived the 1882 Act. The Lord Chief Justice referred to *Phillips* v. *Barnett* (1876) 1 Q.B.D. 436, to demonstrate the meaning of the substantive common law rule. In an article in Vol. 15, p. 133 of this *Review* the present writer submitted that modern cases such as *Chant* v. *Read* [1939] 2 K.B. 286, and *Drinkwater* v. *Kimber* [1952] 2 Q.B. 281, can be explained only on the basis that, regrettable though it may be, the common law rule survives. If a wife was precluded only from suing her husband for torts committed during marriage while, as a matter of substantive law, he was liable, the principle of *Curtis* v. *Wilcox* [1948] 2 K.B. 474, would apply to postnuptial as it applies to

prenuptial torts and she could protect her acquired substantive right as her "property" by an action. The continued existence of the "unity" rule was cogently demonstrated by Professor Glanville Williams in this *Review* (1947), Vol. 10, p. 16.

It would have been unnecessary to revert to this point but for the fact that, in the instant case, Singleton and Denning L.JJ. based their decision not only on the irrelevance of tort liability between husband and wife but also on its existence, *i.e.*, on the view that the second of the above-stated propositions was wrong. Denning L.J. said that the fiction of unity of husband and wife had "no longer a place in our law" and that such disabilities as existed rested only on the wording of section 12, *i.e.*, that they were purely procedural, comparable to those imposed by the Statute of Frauds. The husband's "immunity is a mere rule of procedure and not a rule of substantive law. It is an immunity from suit and not an immunity from duty or liability. He is liable to his wife, though his liability is not enforceable by action. . . ." And, although *Phillips* v. *Barnett* would have to be decided today as it was in 1876, this was so on the ground that "the immunity from suit conferred by section 12, once it has attached, is not lost by divorce." It is, however, with respect, not easy to see how a purely procedural disability imposed upon the spouses as spouses can attach, if, at the time of the commencement of suit, they are no longer husband and wife.

It will be observed that, in the judgment of Denning L.J., "duty" and "liability" are almost identified, and this is also true of the judgment of Singleton L.J. who took the view that the existence of a tort could be concluded from the language used in section 12. Hodson L.J. shared the latter view, but (more correctly perhaps than consistently) pointed out that nevertheless the substantive liability remained.

The survival of remnants of the "unity" fiction, such as the exclusion of mutual tort liabilities, must be regretted. Unfortunately neither the Act of 1882 nor that of 1935 produced the result which Denning L.J. tried to read into the present law. The argument that the vestigial remainders of the common law had been swept away by legislation has so far been unsuccessful in the courts (*e.g.*, *Edwards* v. *Porter* [1925] A.C. 1; *Bayliss* v. *Blackwell* [1952] 1 K.B. 54). Clearly there is a strong case for law reform. That reform, it is submitted, can be brought about only by legislation and not by the courts.

O. Kahn-Freund.

Liability for the Acts of an Agent

The recent decision in *Ormrod* v. *Crossville Motor Services, Ltd.* [1953] 1 W.L.R. 409, though but briefly reported, is of considerable general interest. The facts were as follows: A, a competitor

in the Monte Carlo rally, asked his friend B to drive his (A's) car to Monte Carlo. B was to arrive at Monte Carlo before the end of the rally, but, apart from this, he was free to drive the car in his own time and along a route of his own choosing. After B's arrival at Monte Carlo, A, B and B's wife were to use the car for a joint holiday in Switzerland. The car came into collision with C's motor-bus through B's negligence. Devlin J. held that A was liable to C for damage to the bus.

The learned judge said that, although there was no "legal contract of agency," yet A had requested B to drive the car, and "he who complies with such a request is the agent of the other, since he who makes the request has an interest in its being done" (at p. 411). The relation of principal and agent, therefore, though consensual, is not necessarily contractual. In the present case the purely consensual relation involved the principal in liability to a third party; it might equally have given rise to a liability between principal and agent. For example, if B had used the car to carry a passenger for reward he would probably have been liable to account to A. Thus it is possible that a legal liability can arise under the law of agency from a mere agreement which does not amount to a contract.

Ormrod's Case is also of interest in the field of vicarious liability. A master's liability for injuries inflicted by his servant was probably based in the first place on the consideration that, as the servant was acting on his master's business, justice demanded that the master, who took the benefit, should also shoulder the liability. Our case shows that what was once the juridical basis of a particular rule has now been transformed into a substantive general principle. Vicarious liability is thus no longer restricted to the categories of contract or control, but can arise wherever one person does an act at the request of another who has an interest, financial, social, or moral, in its performance.

Finally, the decision removes one objection to holding a company liable for *ultra vires* torts. It has been argued that, as the company's contract with the tortfeasor is *ex hypothesi* void, his act cannot involve the company in liability. (Goodhart, *Essays in Jurisprudence and the Common Law*, Chap. V). This argument is no longer conclusive, for *Ormrod's Case* shows that vicarious liability does not depend on any contractual relationship between the tortfeasor and the persons to be held liable.

G. H. TREITEL.

PRIVILEGE AND COMMUNICATIONS TO M.P.S

PARLIAMENTARY privilege is a body of case-law that has been developed predominantly by the House of Commons. But if the cases in which questions of privilege have fallen to be decided by

the courts have been few, their constitutional importance has generally been high. *Rivlin* v. *Bilainkin* [1953] 1 Q.B. 485, cannot be regarded as a leading case, but it is worthy of notice if only for the interesting questions it leaves unanswered and for the misconceptions that the decision has already caused in some quarters.

In earlier proceedings between the parties an interim injunction had been granted against the defendant (the plaintiff's former husband) restraining him from repeating alleged slanders against the plaintiff. He subsequently went to the House of Commons and handed to a messenger five communications addressed to named M.P.s and repeating the alleged slanders. One was accepted for personal delivery to an M.P. The plaintiff applied for an order of attachment committing the defendant to prison for breach of the interim injunction, the breach consisting of the publication of that communication. It was argued for the defendant that the court had no jurisdiction to make the order because the publication had occurred in the precincts of the House and was connected with an attempt to obtain parliamentary redress for an alleged grievance. McNair J. rejected this plea, holding that no question of privilege arose, " for a variety of reasons " and particularly because " the publication was not connected in any way with any proceedings in that House." He added, *ex abundanti cautela*, that he had consulted three senior judges of the Queen's Bench Division who had authorised him to say that they agreed with this conclusion (see report in *The Times*, December 19, 1952, p. 2).

The part of the judgment that deals with the question of privilege is disappointingly brief. What were the other reasons for holding that the publication was not privileged? Is the communication of a supposed grievance to an M.P. within the precincts of the House never protected by parliamentary privilege; or protected only if it relates to a bona fide complaint against a public official or authority or to a " political " matter? It is clear, however, that not every defamatory statement made or wrongful act committed within the precincts of the House is protected by parliamentary privilege, and there is reason to believe that even a conversation in the House between M.P.s would be unprotected in an action for slander if it did not relate to a proceeding in Parliament (*cf.* H. C. 101 of 1939, pp. ix, 26, 55–7; Erskine May (15th ed.) pp. 63–4; *R.* v. *Bunting* (1885) 7 O.R. at p. 563). On the other hand it is equally clear that communications made from outside the House by members of the public to M.P.s may in certain circumstances enjoy qualified privilege in the law of defamation: *Dickson* v. *Lord Wilton* (1859) 1 F. & F. 419, N.P.; *R.* v. *Rule* [1937] 2 K.B. 375. Because *parliamentary* privilege does not apparently give the sender of such communications immunity from liability for defamation, it is sometimes thought that the House has no power to take action against persons whose conduct is calculated to interfere with the

freedom of communication between an M.P. and members of the public. The powers of the House in these matters are undetermined (see, *e.g.*, Case of Rev. O. Fielding Clarke, 485 H.C. Deb. 2491 *et seq.*, *et passim*; Case of Mr. D. N. Pritt, 509 H.C. Deb. 798 *et seq.*; 510 H.C. Deb. 43 *et seq.*), but it is consistent with principle to maintain that in a proper case the House could treat such conduct as a contempt even if it did not constitute a breach of a recognised nominate privilege.

S. A. DE SMITH.

THE COURT OF CHANCERY AND TRUSTS

IN periods of uncertainty there are obvious dangers in tying up funds too rigidly in settlements, and it has always been comforting for settlors and their advisers to believe that there was a "safety valve" in the Court of Chancery, which could in an emergency be asked to vary the trusts in the interests of beneficiaries. The importance of this jurisdiction has grown with the rise in death duties and the increase in the difficulties of avoiding them. The extent of the jurisdiction has therefore great practical importance as well as great academic interest in relation to the nature of the Court of Chancery. It is with this that the Court of Appeal was concerned in three cases reported at [1953] Ch. 218, which may be referred to under the name of the first of them, *Re Downshire Settled Estates.*

The cause of the application in each case was the desire to avoid death duties, but that circumstance alone was held to be no bar to relief. The powers of the court were, however, found to be somewhat narrower than had often been believed. By a majority the court denied that the inherent jurisdiction of Chancery enabled it, save in exceptional cases, to authorise general modifications of a settlement. The only general power was to confer on trustees special administrative powers to deal with an emergency or some unforeseen circumstance, when for want of those powers the trustees might be unable to prevent injury to the beneficiaries. Thus special powers of sale or investment could be granted. Here section 57 of the Trustee Act, 1925, had not authorised any wider interference with the trust, it merely enabled the court to act where there was no emergency or unforeseen circumstance justifying the exercise of the inherent jurisdiction. Neither the inherent power of the court, nor its statutory powers, extend therefore to rearranging beneficial interests under the trusts.

The exceptional cases where the court can do that are, it was said, two. First where there is a direction for accumulation, then the court can order maintenance, despite that direction, as effectively carrying out the presumed intent to benefit the family; and secondly where a compromise has been agreed between the beneficiaries who

are *sui juris* the court can consent on behalf of infants and beneficiaries not yet in being, even though an interference with the trusts is involved. Compromise in this context is to be broadly interpreted, including a composition of the rights of beneficiaries, as where, for example, contingent interests are converted into vested interests in a smaller fund, as a price for some concession by other beneficiaries. It will not, however, cover a mere redistribution among beneficiaries in order to save duties. The statutory jurisdiction under section 64 of the Settled Land Act, 1925, is, it was said, much nearer to this head of the inherent jurisdiction, and so is much broader that that under section 57 of the Trustee Act. A warning was, however, entered that where there is no unsold land remaining in a settlement neither section 57 nor section 64 might be applicable, a statement which was *obiter*, and might perhaps be further considered in view of section 75 (5) of the Settled Land Act.

It is impossible in a short note to do full justice to the judgment in these cases; certainly they will repay close study, and, though they define the jurisdiction of the court somewhat more narrowly than it was often thought to be, they do nevertheless allow a fair measure of relief. The anxiety of the court to avoid any rigid definition of the jurisdiction was, however, plain, and important though these cases may be, it is evident that the judgments must be taken as a guide, and by no means as the final word.

J. D. B. Mitchell.

Safe System of Outside Work—the Sequel

The House of Lords have unanimously upheld the decision of the Court of Appeal in the window-cleaning case, [1952] 1 K.B. 141; 1 All E.R. 39, reviewed in this Journal in April, 1952 (15 M.L.R. 243). In *General Cleaning Contractors, Ltd.* v. *Christmas* [1953] A.C. 180 they have held the employers of the injured workman liable in damages for failing to provide a safe system of work. The grounds of their decision are different, however, from those advanced by Denning and Hodson L.JJ. in the Court of Appeal. Their Lordships have fastened upon a passage in the judgment of Lloyd-Jacob J., which did not appear in the All England Reports, to the effect that, even if the suggestions that the employers could have discharged their duty of care by the provision of a ladder or cradle, or by the use of hooks in the wall together with a safety-belt, were impracticable, which the learned judge did not accept, the employers were under a duty to take steps to ensure that the involuntary closure of the lower sash, which caused the accident, was impossible : [1952] 1 K.B. 141, at p. 153. The employers, it is now said, should have instructed their man to examine the window and see what dangers were involved in cleaning it by "the window-sill method," and they should have provided him with wedges or blocks to use

wherever the window was liable to slip or run down. (See Earl Jowitt at p. 189, Lord Reid at p. 193, Lord Tucker at pp. 198–9.) They were negligent in failing to do so.

In so resolving the matter, their Lordships have wisely avoided subscribing to the views expressed in the Court of Appeal as to the provision of safety-belts and hooks, or ladders or cradles, and have neatly turned against the appellant company one of their original arguments in their own defence, *viz.*, that the workman was guilty of contributory negligence in failing to take steps to wedge or secure the window. The result is a sensible decision which clearly demonstrates the continued importance of the common law duties of employers in an age of extensive regulation of conditions of employment by statutory authority. It is rather surprising that the window-cleaning trade has not been made the subject of special regulations : the authorities might well consider this.

Just how difficult it now is for a window-cleaner to fix liability on an occupier in the light of this case and the *Horton Case* can be seen from the later decision in *Bates* v. *Parker* [1953] 2 W.L.R. 642. The Court of Appeal there decided that the occupier was not liable where the accident to the window-cleaner was caused by his placing reliance on a plywood panel fitted in place of one of the window panes, which, without the knowledge of the occupier, he was accustomed to use as a hand-hold, but which the occupier had loosened since his last visit, preparatory to replacing it with glass.

The decision of Lynskey J., which was reversed, was that the loosened panel constituted an unusual danger within the principle of *Indermaur* v. *Dames*, and that the *Christmas Case* did not govern the matter, as it depended on its own particular facts. The Court of Appeal, in disagreeing with this, have adopted the statement of Denning L.J. in the latter case to the effect that " the householder employs the window-cleaner as an independent contractor to clean his windows, and leaves it to him to decide how he shall do it and what safeguards he shall take." In the present case Romer L.J. was prepared to go further and hold that these observations of Denning L.J. were not confined in their effect to window-cleaners but were of general application to independent contractors employed for the purpose of cleaning or repairing premises.

Indeed it can almost be said that independent contractors now act at their own peril. They can, of course, insure against such accidents as occurred in the *Christmas Case* and *Bates* v. *Parker*, but they cannot normally make the occupier liable in damages. The most they can do is charge more for their services, to cover the insurance premiums, if these are found to be heavy. In fact, the law has given a new twist to the old saying that the customer is always right !

J. E. HALL WILLIAMS.

Secondary Parties to Non-Existent Crime

Can a person be guilty as secondary party (principal in the second degree or accessory before the fact) to a crime that does not exist in law? Until the recent decision in *R.* v. *Bourne* (1952) 36 Cr. App.R. 125, an answer would confidently have been given in the negative; but the decision in that case opens up a new vista of possibilities.

The conduct proved against the accused was so revolting that it is small wonder that the court was willing to strain every resource of the law against him. Reducing the sordid facts to their essential minimum, he had compelled his wife by duress to commit an unnatural offence with an animal. He was sentenced concurrently for aiding and abetting the wife to commit the offence, inciting her to it, and indecent assault upon her. On appeal, it was held by the Court of Criminal Appeal that the conviction was proper on all grounds. The argument for the appellant was that the conviction for aiding and abetting was wrong, because if the wife had been charged she would have had a defence on the ground of duress, and the accused could not be guilty of aiding an offence that in law had not taken place. This argument was rejected on the ground that the defence of duress "admits that she has committed the crime but prays to be excused from punishment by reason of duress. . . . She could have set up the plea of duress, not as showing that no offence had been committed, but as showing that she had no *mens rea* because her will was overborne. . . . The offence of buggery does not depend on consent; it depends on the act, and if an act of buggery is committed, the felony is committed."

With all respect, it is difficult to accept these dicta literally. Duress is more than a prayer to be excused from punishment; it is a legal defence which within its limits entitles the accused to a verdict of not guilty. There is no question of discretion about it. The notion that, where the *actus reus* of felony is committed without *mens rea*, there is a felony for collateral purposes, is one without precedent in the long history of the criminal law.

The actual decision is directly contrary to *Tyler* (1838) 8 C. & P. 816, which was cited in argument, where it was ruled that there could not be a conviction of aiding and abetting a person of unsound mind. The solution of the difficulty adopted in *Tyler* was to convict the accused as principal in the first degree acting through an innocent agent, and it is submitted that this was the proper mode of reaching the result in *Bourne*. It may be noticed that the doctrine of innocent agency is applicable even to statutory offences. Where a statute uses a verb like "enters," "publishes" or "makes," there is abundant authority for saying that conduct by an innocent agent coming within the verb will be attributed to the principal. There seems to be no difficulty in reaching the same conclusion for unnatural offences.

There are two situations that the doctrine of innocent agency fails to reach. The first is the semi-innocent agent. Here there is an exception to the first part of the ruling in *Tyler*, for a person may be convicted as principal in the second degree to a crime of graver nature than the principal in the first degree. Thus, a principal in the second degree may be convicted of murder when the principal in the first degree, who alone was provoked, is convicted only of manslaughter (*cf. Hale P.C.*, i, 438; *East P.C.*, i. 350; *Moore* v. *Lowe* (1935) 116 W.Va. 165; 180 S.E. 1). Secondly, the doctrine of innocent agency fails to reach the situation where the morally guilty person cannot himself be brought within the words of the statute. Thus, if a statute penalises an act only when done by a person having a licence, a morally guilty person who does not himself possess the licence cannot (in the absence of an offence committed by the licensee) be convicted under the doctrine of innocent agency or at all (*Morris* v. *Tolman* [1923] 1 K.B. 166). Another illustration is *Thornton* v. *Mitchell* [1940] 1 All E.R. 339, where an omnibus was being reversed, and the conductor negligently signalled to the driver that the road was clear, when in fact there was a pedestrian behind the omnibus. It was held that the conductor could not be convicted of aiding an offence that the driver had not committed. Only the driver could be convicted of careless driving as principal in the first degree, and here the driver was not careless, but only the conductor. Nor could the conductor be regarded as constructively driving, because such a wide interpretation of " driving " in the particular statute would have led to manifest absurdities. It would have meant, for example, that no one could employ a chauffeur to drive him in his car without himself passing the driving test and having a licence.

It is submitted that these last two decisions were inevitable on the wording of the statutes, and that no wider interpretation was possible without an undue extension of the field of constructive crime.

The reasoning in *Bourne* seems to be that there is a kind of ghost crime committed by the actor which is sufficient to inculpate the secondary party. The rule is basically inconsistent with the decision of the same court only the year before in *Walters* v. *Lunt* [1951] 2 All E.R. 645, noted *ante*, Vol. 15, p. 222, where it was held that there could be no receiver of goods taken by a child under eight.

Glanville Williams.

Fraudulent Taking in Larceny

Among the more familiar epithets used in defining statutory offences is the word " fraudulently," which is generally regarded as denoting the precise mental element requisite in such crimes. Probably the best known illustration occurs in the definition of larceny in

section 1 (1) of the Larceny Act, 1916, which provides : " A person steals who, without the consent of the owner, fraudulently and without a claim of right made in good faith, takes and carries away anything capable of being stolen with intent, at the time of such taking, permanently to deprive the owner thereof." Strange though it may seem, however, until the decision of the Court of Criminal Appeal in *R.* v. *Williams* [1953] 2 W.L.R. 937, no authoritative modern interpretation existed as to the meaning of " fraudulently " in that section. The appellant in that case was a sub-postmistress at a general shop in which her husband carried on business. When the shop was in financial difficulties the appellant took money from the till in the postal department and used it for the business of the shop. On the basis of the appellant's expressed intention to repay the money out of the sales in the shop two lines of defence were put forward, *viz.*, (1) that she had not intended permanently to deprive the Postmaster-General of the property in the money, and (2) that she had not acted fraudulently.

The first defence was calculated to negative the necessary *animus furandi* but, as Lord Goddard C.J. rightly stated, it was essential to appreciate that what was alleged to have been stolen was money. In the opinion of the court, the coins and notes having been taken from the postal till and used in the business of the shop the appellant intended permanently to deprive the Postmaster-General of those coins and notes. Currency has always occupied a special position in the law of larceny, creating well-known difficulties in connection with the distinction between larceny by a trick and false pretences, and larceny and fraudulent conversion. This aspect of the decision in *R.* v. *Williams* must be considered in relation to the particular facts of that case, and no suggestion should be read into the court's ruling that a person who wrongfully borrows any article [1] other than money, such as a book or a bicycle,[2] intending eventually to return it, is guilty of larceny.[3]

The second line of defence raised the question, what is the meaning of " fraudulently " in the statutory definition of larceny? In its requirement that the taking must be fraudulent the Larceny Act merely repeats what was deemed necessary in Roman law,[4] and examination of the definitions put forward by Coke [5] and Hawkins [6]

[1] It is now a statutory offence under the Road Traffic Act, 1930, s. 28, to take and drive away a motor-vehicle without the consent of the owner or other lawful authority. This offence was created owing to the difficulty experienced in proving an intent permanently to deprive the owner of his property in the vehicle.

[2] Under the Criminal Justice Act Northern Ireland), 1953, s. 15, it is made an offence to take away a pedal-cycle in circumstances similar to those already existent in the case of motor-vehicles.

[3] Illustrations of this principle are to be found in *R.* v. *Phillips* (1801) 2 East P.C. 662; *R.* v. *Webb* (1835) 1 Moo. 431; and *R.* v. *Addis* (1884) 1 Cox 78.

[4] See Stephen, *H.C.L.*, iii, 131–2.

[5] *Institutes*, iii, cap. 47.

[6] *P.C.*, 134.

indicates the same emphasis on " a felonious and fraudulent taking," while East [7] adopts the phrase " a wrongful and fraudulent taking." Modern opinion, as expressed in the current edition of *Russell on Crime*,[8] is that the word " fraudulently " adds nothing to the more precise phrase " without a claim of right," and reliance is placed on the judgment of Parke B., more than a century ago, in *R.* v. *Holloway* (1848) 3 Cox 241, at p. 244.

Insomuch as the Court of Criminal Appeal in *Williams* also referred to Parke B.'s opinion in *Holloway*, it is important to note that different versions exist as to what the learned Baron said in that case. Referring to East's definition of larceny, Parke B. is quoted in two series of reports [9] as saying: " Some further explanation is needed of the words ' wrongful and fraudulent '—they probably mean without colour of right "; whilst in another report [10] he is cited as declaring: " this definition needs some addition, the taking should be not only wrongful and fraudulent but should also be without any colour of right." Having regard to the patent conflict evidenced by the above extracts from the reports, it would seem that little profit is to be gained from dwelling on the repudiation in *Williams* of Parke B.'s view that the two expressions are synonymous. In the opinion of the Court of Criminal Appeal the word " fraudulently " is intended to, and does, add something to the phrase " without a claim of right." Prefacing the court's definition with the warning that the words used might not fit every case—an admission which surely weakens any definition—the Lord Chief Justice said that the term " fraudulently " meant that " the person who takes the property must know when he takes it that it is the property of another person, and he must take it deliberately, not by mistake, and with an intention to deprive the person from whom it is taken of the property in it." [11] Thus, explained Lord Goddard, if a person picks up a suitcase at a railway station in the mistaken belief that it is his own, he does not take it fraudulently. Such conduct might equally well be described as manifesting a claim of right made in good faith, as may also be said of the case where a finder believes that the owner cannot be discovered by taking reasonable steps,[12] or has abandoned the article,[13] and resolves to keep the article for himself. These examples indicate

[7] 2 *P.C.* 553.

[8] 10th ed., Vol. 2, p. 1175. For the contrary view, see Cross, 68 L.Q.R. 103, and the present writer in 14 M.L.R. 218–9.

[9] 18 L.J.M.C. 60, at p. 62, and 3 Cox 241, at p. 244. *Cf.* the report in 2 Car. & Kir. 942, at p. 946, in which the absence of a colour of right is related to the word " felonious."

[10] 1 Den.C.C. 370, at p. 375. Whereas the learned editor of *Russell* relies on the report in *Cox's Criminal Cases*, it will be seen that in the recently published *Cases on Criminal Law* by Turner and Armitage, preference is shown by the same editor for the report in *Denison's Crown Cases*.

[11] [1953] 2 W.L.R. at p. 941.

[12] See *R.* v. *Reed* (1842) C. & M. 307.

[13] See *Ellerman's Wilson Line* v. *Webster* [1952] 1 Lloyd's Rep. 179.

the difficulty of disassociating the word "fraudulently" from what hitherto has been described as acting without a claim of right made in good faith.

Later in the course of his judgment Lord Goddard C.J. said of the sub-postmistress and her husband, "they acted fraudulently because . . . they knew that they had no right to take the money," and their conduct made it clear that "they had acted dishonestly." [14] It is in this sense of acting dishonestly, it is submitted, lies the true explanation of the word "fraudulently." It is in this sense that the Divisional Court in *Rose* v. *Matt* [1951] 1 K.B. 810, spoke of the true owner's fraudulent taking of his own clock from a shopkeeper to whom he had entrusted it as security, and in which the shopkeeper had a special property. Moreover, it is in this general sense of dishonest conduct that the earlier cases, involving an intent to charge a bailee in detinue,[15] or to expose a bailee to a penalty payable under a bond,[16] or even an intent to defraud the Crown,[17] are explicable. This interpretation is basically the same as "the absence of honest intention" test which Channell J. in *R.* v. *Carpenter* (1911) 22 Cox 618, 624, said was the yardstick with which to judge an intent to defraud in a case of obtaining by false pretences. Stating that Channell J.'s test was just as apposite in cases of larceny, the court in *R.* v. *Williams* held that it is no defence for a person in the position of the appellant to prove that, although not in a position to replace the money at the time of taking, she hoped and intended to be able to do so in the future. However, in the same breath, Lord Goddard added that the taking would not be fraudulent if the person who dabbles with somebody else's money is an individual with good credit and with plenty of personal funds. Thus, what would appear to be laid down as a rule of law in *R.* v. *Williams* is, in effect, reduced to a question of fact, wherein the issue of honest or dishonest conduct is left for the jury to decide having regard to all the facts before them.[18]

J. Ll. J. Edwards.

[14] [1953] 2 W.L.R. at pp. 939, 943.
[15] 1 *Hale P.C.* 513.
[16] *R.* v. *Wilkinson and Marsden* (1821) Russ. & Ry. 470.
[17] *Ibid.*, p. 472.
[18] *Cf. R.* v. *Medland* (1851) 5 Cox 292, and *R.* v. *Trebilcock* (1858) D. & B. 453.

REVIEWS

Law and the Laws, being the Marginal Comments of a Theologian. By Nathaniel Micklem, Principal of Mansfield College, Oxford. [Edinburgh: W. Green & Son, Ltd. London: Sweet & Maxwell, Ltd. 1952. viii and 122 pp. 15s. net.]

It is always interesting, and sometimes chastening, for lawyers to hear the views about law expressed by laymen, and here the jurist can find his familiar problems stated from the point of view of a theologian. The retiring Principal and Professor of Dogmatic Theology of Mansfield College has based his book on the Wilde Lectures which he delivered in 1949. His theme is the relationship between theology, moral philosophy and jurisprudence (which in medieval times would not need to be argued), his aim is directed towards a Christian philosophy of jurisprudence, and he modestly excuses himself for his temerity by asking "what theologian or what lawyer in this country has of recent years attempted seriously to relate theological and legal theory"? Although he disclaims a first-hand knowledge of many of the jurists whose theories he surveys, he has thought long and deeply about these matters, as befits the son of one of Queen Victoria's counsel now in his hundredth year.

In the first two chapters Dr. Micklem discusses the relation between jurisprudence and ethics (the moral basis or aim of law) and between jurisprudence and theology ("The rejection of religion heralds the end of the reign of law," p. 16). The specialisation of the sciences has isolated law in modern times: how was it related in the past to these other and higher systems of norms? For the classical tradition of thought on this question Cicero is taken as the guide. Chapter 3 contains a good summary of Cicero's *De Legibus*, and it is assumed that this work represents the Graeco-Roman tradition. Medieval thought in this field is concerned with two questions, the eternal law and the law of nature (Chap. 4) and positive law and the law of nations (Chap. 5). These two chapters rely largely on Suarez, *Treatise on Laws and God the Law-giver*, a choice which may be justified by the author's special interest in international law: otherwise St. Thomas Aquinas, to whom a few references are made, might be thought more representative of the medieval Christian tradition. The discussion of modern jurisprudence (Chaps. 6 and 7) is based mainly on the theories of Austin, Kelsen, Duguit, the sociological school of Roscoe Pound and the historical school of Savigny. An appeal is made for the inclusion of justice in the definition of law (pp. 50–53), and "social engineering" is reduced to "a process of tinkering" (p. 60). Chapter 8 is an eloquent plea for natural law whose aim is justice, and this idea Dr. Micklem reconciles with the findings of historical jurisprudence. He does not think much of natural rights, but half-heartedly admits "natural claims" (Chap. 9). The connection between theology, moral philosophy and jurisprudence is most evident in international law (Chap. 10). In the discussion of corporate personality (Chap. 11) we are asked to remember that all human associations are relations between men, not substantial essences. The conclusion of this sincere and thoughtful book is that "if the requirements of religion be overlooked . . . the requirements of the law will soon cease to be met, and, further, the law itself will insensibly change its requirements and soon turn to its own negation" (p. 113).

The author has a tendency—perhaps due to his theological training—to use quotations from legal authors not as mere illustrations but as arguments or even proofs; but almost any of these quotations taken out of their context

could form the subject of a critical question. It might appear from references to the Digest at p. 39 that the Romans used "*jus gentium*" to mean international law. Some allusion might have been made in Chapter 5 to the doctrine of the natural rights of States. It is said at p. 60 that "social engineering" is a phrase "not repudiated by Roscoe Pound himself." Surely Pound coined the phrase, and he likes it so much that he reiterates it in his latest book *Justice according to Law*. The references to legal textbooks given in the footnotes date mostly from the time when the lectures were delivered rather than when the book was prepared for publication. We need not be fastidious about that in a book of this kind, but two or three specific complaints may be made. References to Allen's *Law in the Making* are to the 1st ed. (pp. 2, 17), the 2nd ed. (pp. 7, 66), the 4th ed. (p. 67), or no edition at all (pp. 14, 20 and 91). It is strange to find Dicey's *Law of the Constitution* cited from the 3rd ed. (p. 17). A quotation from Sir Percy Winfield at p. 19 is said to come from the *Harvard Law Review*, but we must consult Paton's *Jurisprudence* (presumably the 1st ed.) to find the volume and page. The inconvenience of inconsistent or out-of-date references is increased where they are the sources of second-hand quotations. Whether "By me kings reign" comes from Chap. 7 or Chap. 8 of Proverbs must be left to theologians to decide (*cf.* pp. 42, 44).

O. Hood Phillips.

Cases on Church and State in the United States. By Mark de Wolfe Howe. Harvard University Press. [London : Geoffrey Cumberlege. 40s.]

It would be too harsh a judgment to say that the Founding Fathers shirked the issue of religion in constructing their new instrument of government, but it might be reasonable to assert that it was a subject upon which they felt less certainty than they did, for instance, on property or popular democracy. For purposes of political propaganda Jefferson could allow that men are endowed by a Creator with certain unalienable rights, but whether the Creator was an anthropomorphic God or a merely mathematical final cause did not greatly concern those wise and experienced gentlemen.

The First Amendment to the Constitution mentions religion definitely and, in the context of State-building, negatively. There is to be no established religion and no obstructions to the free expression of religious ideas. Thus it has become possible to argue that the Federal Government, and, in its train, the State Governments are to be considered as definitely negative with regard to the pressures of the religiously inclined who would wish to influence government towards sympathy for their particular church or for religion in general. But the role of government as the impartial arbiter between the forces of religion and anti-religion has been difficult to maintain in an environment where militant atheism has never proved as acceptable socially as moderate religion. Materialism and agnosticism have had their triumphs, notably in the Scopes trial, and their publicists of national renown in Ingersoll and Mencken; but the irreligious, it is confidently assumed, are temporary and light-hearted backsliders; they are not atheists.

What have, in fact, been the practices of American communities become powerful arguments on the side of those who argue that religious sentiment is a natural and useful cement of the constitutional edifice, and that therefore this comfortable development of social values should bear more weight with the courts than formal constitutional principle. As Mr. Justice Reed put it in *McCollum*, dissenting: "Devotion to the great principle of religious liberty should not lead us into a rigid interpretation of the constitutional guarantee that conflicts with accepted habits of our people. This is an instance where, for me, the history of past practices is determinative of the meaning of a

constitutional clause, not a decorous introduction to the study of its text" (333 U.S. 203, 1948).

If religion is a cement, the consciousness of religious diversity may well prove a solvent. Any public authority which by its policies emphasises this consciousness of diversity may find that its actions are not welcomed by the courts. That at any rate seemed to be one of the lessons of *McCollum*, but the Court of Appeals of New York in 1951 (*Zorach* v. *Clauson*, 100 N.E. 2d. 463) gave its approval to a system of religious instruction in the State which differed from that condemned in *McCollum* by a hairsbreadth. The "wall of separation between Church and State" no doubt still exists, but it is no longer constructed of unyielding stone. New and flexible materials are in fashion. The wall is no longer straight, but is conforming to the pattern of the varying political and social pressures applied to it by the weight of organised political-religious groups. All wish to find accommodation within the wall, for outside life is more difficult and rather more expensive.

Professor Howe has compiled an instructive array of cases to illustrate the major phases of the Church-State question in the United States. The cases are arranged to illustrate various aspects of the general issue, but an historical line of development is also displayed. Disestablishment was the classic problem of eighteenth-century America, while education is the question of our time. To connect the two we have Mr. Justice Rutledge's immense opinion in *Everson* (330 U.S. 1, 1947) here reduced to a "flashback" of five pages—in the opinion of this reveiwer rather too summary a treatment. There is great variety in Professor Howe's selection; Disestablishment, the Church as Corporation, Ecclesiastical Adjudication, Police Powers and Education. We have Jefferson's researches into Hale's opinion that "Christianity is parcel of the laws of England" set out with a nice respect for the ancient reports and the Norman-French idiom. The vicissitudes of the Russian Orthodox Church are related in *St. Nicholas Cathedral* v. *Kedroff* (302 N.Y. 1, 1950). Here the whole history of the Church in modern Russia, from its casting out after the October Revolution to its recall, in 1945, to political use as a part of the Soviet State, is set down in fascinating detail. In *S. S. and B. Live Poultry Corp.* v. *Kashruth Corp.* (S.Ct. of N.Y., N.Y. County 158 Misc. 358, 1936) we hear the sad story of a Bronx poultry dealer who did not appreciate the extent of the jurisdiction of the orthodox rabbis. (The student will recall that chickens also made legal history in a famous New Deal case.)

There is a comic diversion in the case of Guy W. Ballard, alias St. Germain, who used the much-abused U.S. mails for fraudulent "religious" purposes. The U.S. Supreme Court withheld canonisation in 322 U.S. 78, 1944. From such light reading we can turn to the U.S. Supreme Court's decisions in the Flag Salute cases and in *Everson* and *McCollum*. The finale is on Broadway, with a double feature, the Italian film the *Miracle* and *Streetcar*, both of which, it was asserted, would give offence to the Catholic faithful, and Catholics are organised to repel attacks upon their faith and their moral values.

Professor Howe is too modest in using the adjective "temporary" to describe this first edition. It is an important book of cases for the American student. Religion is an essential part of the American way of life and its importance for the constitutional lawyer may well increase, especially if the Federal Government takes bold steps to assist those great institutions of higher education in United States that are private foundations, for many of them have denominational origins. Religious questions are becoming somewhat uncomfortably involved in political issues in America. Many local, and even some Federal, practices seem prima facie unconstitutional, but the courts can take comfort in their difficulties from the view of Chief Justice John Marshall that the American constitution is not to be subjected to "refined and metaphysical reasoning" which might leave it "a magnificent structure indeed to look at but totally unfit for use."

R. H. PEAR.

Bailment in the Common Law. By G. W. Paton, M.A., B.C.L., of Gray's Inn, Barrister-at-Law; Vice-Chancellor of the University of Melbourne. [London: Stevens & Sons, Ltd. 1952. xl and 446 and (index) 8 pp. £3 15s. net.]

In his Preface to this new work, the author suggests that "there is value in attempting to look at the whole law of bailment within the cover of one work." It is precisely this convenient comprehensiveness which gives this book its greatest value. Previously, in order to obtain up-to-date material on the law of bailment, reference had to be made to various treatises on other branches of the law, where bailments were discussed often reluctantly, usually cursorily, and almost invariably unsatisfactorily. Now we have, in one volume, a concise treatment of every aspect of the law of bailment.

Part 1 contains a discussion of the juristic principles underlying bailment, such as the delivery of possession, and its relation to contract, tort and property. There is also a sketch of the Roman law of bailment, and a fuller treatment of the historical development of bailment in English law.

The scheme of the book in Parts 2 and 3 is to devote a chapter to each of the recognised categories of bailment; the gratuitous bailments of, *e.g.*, Deposit, Mandate, etc., in Part 2; and the Bailments for Valuable Consideration in Part 3, *e.g.*, Custody, Innkeepers, Carriers, Hire, Hire-purchase, Pledge, etc. Within each of these chapters, we have sections such as an Introductory Discussion, Duty of Bailor, Duty of Bailee, etc.

Remedies in Bailment are dealt with in Part 4, which also contains chapters on such associated topics as Measure of Damages, Limitation of Actions and the defence of Act of God. In Part 5, the author treats of bailment in its relation to the Criminal Law, *e.g.*, Larceny as a Bailee, Theft by Owner from Bailee, etc.

The advantages of having all this material at hand in one volume are manifest, but, over and above this, there is the advantage of having bailment treated as a single self-sufficient topic, not merely as an excrescence on some other branch of the law. This subservience of bailment in the past, particularly to the law of contract, has brought about several undesirable results, perhaps the most important of which is the confusion which arises from the imagined necessity of spelling out consideration even in cases of gratuitous bailments. This question is very well dealt with by Professor Paton, although he may be speaking somewhat optimistically when he asserts, on p. 40, "It is now recognised that gratuitous bailment, by its very definition, has nothing to do with the law of contract at all." It is true, as he mentions, that "this is the thesis of Cheshire and Fifoot and Salmond and Williams," also, we may say, of Winfield, and now, it may be added, of Paton. But it is one thing, as we know only too well, to have a truth accepted academically and quite another thing to have it applied judicially; as witness the phrase cited by Professor Paton himself on the same page from a judgment of Scott L.J. in 1948, "the contractual liability of a gratuitous bailee." Even more recently, in *U.S. of America and Republic of France* v. *Dollfus Mieg, etc.*, Earl Jowitt speaks of a "simple contract of bailment." As long as this phrase is in constant judicial use, it is surely premature to speak of the complete independence of bailment.

In this connection, it is pleasing to find *Ballett* v. *Mingay* treated, on p. 39, as it should be, as a further example in the line of cases often exemplified by *Burnard* v. *Haggis*, and not cited, as it all too often is, as authority for the proposition that bailment can exist independently of contract. As Paton points out, Lord Greene M.R. in holding that there was a good action in detinue, made it clear that the essential act was the parting with possession of the articles, which act was "outside the purview of the contract of bailment altogether" (another example of the constant use of that phrase). It might be a matter for speculation what the decision would have been if the infant

bailee had retained the goods himself. The reasoning of the Master of the Rolls could not then have been applied, but might it not have been possible to make the same approach as in *Bowmakers' Ltd.* v. *Barnet Instruments, Ltd.*?—where, in the case of illegal contracts, the bailor was permitted to recover the machines bailed merely by virtue of his property in those machines.

This latter case and Mr. Hamson's analysis of it in 10 C.L.J., is dealt with fully on pp. 34–36, but under a different head, and it is significant that no analogy is suggested between these two cases. Herein lies perhaps the main weakness of the work. In general, it deals more than adequately with the authorities, not only English, but also Dominion and American, with Roman influence and historical developments, and with the individual types of bailments. Yet, for all this, it lacks a satisfying unity and, to some extent, constructive and advanced analysis. Such a criticism may seem odd with reference to the author of one of the leading textbooks on Jurisprudence, but reference may be made, for example, to Chapter 6, on Finding. This consists almost entirely of quotations from Pollock and Wright and from Professor Goodhart's Essay on *Three Cases on Possession*, together with summaries of decided cases and extracts from the judgments in those cases. One finds little original inspiration to throw any fresh light on these dark, controversial issues. What is the essential difference, expressed in legal terms, between a "real" and a "colourable" loss and finding mentioned on p. 120? Later in the same paragraph, we find the sentence, "The test" (as to whether a finder in a "colourable" finding is guilty of theft) "is the moment of taking possession." Presumably, from the context, this could be clarified into "the test is the presence or absence of the *animus furandi* at the moment of taking possession," but it might also mean "the vital fact to determine is the moment of taking possession." Discussion on such a delicate point as this should not be affected by ambiguity.

On p. 40, we find, "In gratuitous bailments, so far from the bailor giving consideration he is receiving a benefit from the transaction." This would appear to involve the consequence that a party to a contract can never furnish consideration if he obtains an overall benefit from the performance of the contract. If Professor Paton wishes to avoid the possibility of such a misunderstanding, then the phrase ought to be more carefully worded, as indeed it is, to some extent, on p. 99 and again on p. 132.

Again, what is the difference between a "delivery of possession" and a "transfer of possession" on p. 6? And can there indeed be a bailment of a chose in action as would appear from the Australian case of *R.* v. *Geake* on p. 26, or is it not rather a bailment of that chose in possession which evidences the right to the chose in action? No attention is paid to the distinction by the author, who several times defines bailments as confined to personal property, without excluding choses in action, although it is difficult to imagine how one can have a bailment, with its delivery of possession, of a chose which, *ex hypothesi*, has still to be reduced into possession.

Sometimes, too, it is not easy to see the precise connection between the summary of a case as given in the text and the proposition which it purports to illustrate, *e.g.*, the case of *Goodman* v. *Boycott* on p. 31, or the Australian case of *Penfold Wines Pty., Ltd.* v. *Elliott* on p. 65. Other minor points are that the facts of *Maurice* v. *Goldsborough Mort & Co.* are summarised in note 90 on p. 24, with no reference to the fact that this case has been more fully discussed in the text only five pages earlier; while passages on p. 30 and 49 state that in Roman law possession did not pass under *pignus*, although the contrary is stated, correctly, when *pignus* is discussed on p. 50.

In a book so full of authorities, it might seem superfluous to mention a few cases which are not cited—certainly not according to the very accurate Table of Cases—but one would expect to find such "old faithfuls" as *R.* v. *Rowe* (1859) on finding; *Ross* v. *Edwards* (1895) on eviction of a bailee by title paramount; *Rogers* v. *Lambert* (1891) on *jus tertii*; *The Tubantia* (1924) on

the *corpus* in possession; and the more recent case of *Walters* v. *Lunt* (1951) on larceny by a bailee or by finding. It is suggested that cross-references might be to a particular page, where possible, not merely to a section which might cover as many as 19 pages; and a Table of References might be useful to elucidate, for non-Australian readers, such chess-like references as St.R.Qd.

In conclusion, then, this book is well conceived and the material well assembled, but its value would be enhanced if, in a second edition, the author gave us the benefit of a deeper analysis of the type of issue which has here been raised.

C. F. Parker.

Gibson's Conveyancing. Seventeenth Edition. By R. H. Kersley, m.a., ll.m., Solicitor. [London : The Law Notes Lending Library, Ltd. 1952. cxii and 719 and (index) 65 pp. £3 17s. 6d. net.]

The Elements of Conveyancing. Eighth Edition. By J. F. R. Burnett, of Gray's Inn, Barrister-at-Law. [London : Sweet & Maxwell, Ltd. 1952. xxxi and 490 and (index) 18 pp. £2 7s. 6d.]

The Sale of Land. By Edward F. George, ll.b., Solicitor. [London : Sweet & Maxwell, Ltd. lxiii and 542 and (index) 34 pp. £3 3s. net.]

Gibson and *Burnett* have been for many years leading conveyancing textbooks, and it is therefore no small commendation to say that the latest editions should maintain and enhance the reputation won by their predecessors. To keep such works up to date is a difficult task. The text of *Gibson* remains constant (as it has done for at least four editions) yet the editor has incorporated some 350 fresh cases and has added chapters on Preliminary Enquiries and Compulsory Purchase. The former includes a full account of the Town and Country Planning Act, 1947; the Agriculture Act, 1947, might well be mentioned here also, instead of being confined to the section on agricultural tenancies. Very welcome, too, are the new references to articles in periodicals and opinions given by the Law Society, and the emphasis (pp. 440, 528) on income tax and death duties as factors influencing the making and drafting of settlements. The only serious criticism or suggestion is that *Gibson* could be made more valuable to students by more explanation and illustration of the working of the various principles—at the expense perhaps of some quotation of the 1925 Acts. For example, the chapter on settlements is, like the rest of the book, both comprehensive and accurate, yet the student may well be happier with the shorter account in *Burnett* because of the numerous examples it contains. Again, *Burnett's* 70 pages of precedents (pp. 422–490) may be more helpful than *Gibson's* citation of forms from the appendices to the 1925 Acts. These forms are always very brief and may not be satisfactory, *e.g.*, the charge by way of legal mortgage from the Law of Property Act, 1925 (given at p. 293) contains no reference to any date for redemption.

It is somewhat surprising to find the preface to *Burnett* opening with the remark that since 1944 "the law relating to conveyancing has been little affected either by statutory enactment or by decision of the courts." This conservative outlook affects the emphasis given to various topics. In connection with the sale of land, for example, too much seems to be made of open contracts and contracts by correspondence (the Lord Chancellor's conditions are quoted in full) and too little of the problems posed by planning law, etc. In general, as already indicated, *Burnett* gives a very sound basic account of conveyancing. One point calling for mention is that section 50 of the Law

of Property Act, 1925 (providing that the court can declare land free from an incumbrance if the money is paid into court), is so underlined at pp. 20 and 134 that a student might justifiably believe it to be the normal method of discharging a mortgage on a sale by the mortgagor.

George on the *Sale of Land* is of course a new venture. The author has aimed at writing primarily an account of the present or post-1925 law, including however, necessary chapters on Devolution of Title before 1926 and Transitional Provisions. With this scheme of arrangement one is rather surprised to find, in the chapter on Investigation of Title and Requisitions, a section called "Effective Grant of Legal and Equitable Interest" (pp. 405–423) containing a discussion of the validity of conditions, *Shelley's Case*, *Wild's Case*, the Rule against Perpetuities and even *Purefoy* v. *Rogers*. These matters should, it is suggested, be considered in connection with settlements.

Registered Title is not relegated to a separate chapter but treated as a particular aspect of the various stages of a sale—a method to which other books must surely eventually conform. A general account of the system appears in Chap. XII, Investigation of Registered Title. Mr. George has sought, too, to emphasise the importance of conveyancing practice. Where this is uncertain he rightly does not hesitate to give a lead—on the general question of disclosure he does not show undue favour to the vendor. The introductory chapter outlining the steps to be taken should be particularly helpful to the inexperienced conveyancer.

More could usefully be said about purchases and sales involving the creation and redemption of mortgages, especially where building societies cause variations of normal practice; their general habit of not producing vacated mortgages on completion ought to be referred to at p. 519. Use of the book would be aided by more thorough cross-referencing. There are some omissions. Reference ought to be made, it is suggested, to compound settlements after 1925 (the index confuses section 31 of the Settled Land Act with the same section of the Law of Property Act); to the danger of a purchaser let into possession before completion getting a Rent Act tenancy; to the point made in *Fisher* v. *Winch* [1939] 1 K.B. 666, that Ordnance Survey maps take the boundary down the middle line of a hedge (pp. 135, 400, 468); and as regards educational assurances, *Magdalen College, Oxford* v. *Att.-Gen.* (*Re No.* 112 *Regent Street*) (1948) 64 T.L.R. 606 should not only be cited but perhaps emphasised since it revealed an error in interpretation and so in practice. The statements about escrows at p. 516 seem to need some reconsideration in the light of *Thompson* v. *McCullough* [1947] K.B. 447, which is not cited.

However, these are points of detail. Without doubt Mr. George has carried out his intention, expressed in the preface, of providing a sound guide to the ordinary practice of sale and purchase in day-to-day conveyancing. Nevertheless (as the rarity of reference to articles in periodical literature underlines), this is a limited objective. Should not a book limited to one transaction aim at being the leading and authoritative work on the subject, and would not such a book be equally valuable to and popular with the profession? One hopes the author will consider this point when a second edition is called for.

F. R. CRANE.

THE TORRENS SYSTEM IN NEW SOUTH WALES. By JOHN BAALMAN. [Sydney: The Law Book Co. of Australasia Pty., Ltd. 1951. 457 and 28 pp. (Index) and xxiii (Tables). £3 17s. 6d.]

THE title of this book suggests a highly specialised one, unlikely to be of much general interest to English readers, and at first sight its form, which is that of a commentary on the sections of the legislation involved (primarily the Real Property Act of New South Wales, 1900), might appear to confirm that impression. Those facts are unfortunate since the book is far from being

narrow and far from having only a local interest. At least such a book, dealing with a comparable if not identical system to our own, would have value at a time when litigation has not yet resolved, or perhaps discovered, all the uncertainties of our own legislation. That purpose the present work could fully achieve, but it can do much more. Its title is in one sense misleading, since the author had drawn for his comments on a wide learning. New Zealand and Canadian cases, and cases in the Privy Council from as far afield as Malaya are all used in the discussion of principles as well as Australian and English authorities. Moreover, although in one sense a practical book, the discussion is of principle, there is little or nothing of the mere citation of cases which sometimes passes for commentary. The comments are critical, and where issues are undetermined, solutions are suggested. The book is clearly by an enthusiast, but to that enthusiasm the author has added learning to produce a book of general interest even if the form necessarily makes it hard reading at times.

The enthusiasm of the author naturally leads him to accept both for his own jurisdiction and for this country the thesis that the registered estate of the proprietor is something different in nature from the unregistered estate. That matter is arguable, and indeed the author demonstrates the width of the incidents of the unregistered estate which have been held applicable to the registered. Perhaps on that matter a reference might be inserted in future editions to the discussion in Vol. XII of this *Review*. To an English lawyer one surprising feature is the extent to which the Registrar intervenes not merely on the initial examination of title (where the practice seems to be somewhat stricter than here) but also on dealings. The Registrar has refused to register transactions which were in breach of trust, *e.g.*, sales by trustees below market value or transactions beyond the powers of corporations and may himself enter a caveat. It is true that not all the actions of the Registrar have been upheld by the courts, but it is evident that his functions are regarded as stretching further than is the case here. There are many other differences which are of interest, the treatment of personal representatives and squatters, but the main interest of English lawyers will lie in the discussion of void and forged transfers, of the nature and extent of indefeasibility conferred by registration and the circumstances and extent of compensation. It is true that in some cases allowance must be made for variation in the terms of the Acts, nevertheless in many cases a reference to the work will prove helpful even in domestic matters.

It should be added that the comments are well written and extensive, one comment on a judgment of Salmond J. might indeed have been written by Kai Lung. Generally speaking, the facts and essential parts of the judgments in cases are given so that access to Australian reports is not essential to the usefulness of the book. The only doubt that remains is whether the annotated form allows the author to do himself full justice.

J. D. B. Mitchell.

Craies on Statute Law. Fifth Edition. By Sir Charles E. Odgers, M.A., B.C.L., of the Middle Temple, Barrister-at-Law, late Puisne Judge of the High Court of Judicature at Madras. [London: Sweet & Maxwell. 1952. cvii and 618 pp. £5 10s.]

The Construction of Deeds and Statutes. Third Edition. By Sir Charles E. Odgers. [London: Sweet & Maxwell. 1952. xxvi and 351 pp. 30s.]

COMMENTS, CASES AND OTHER MATERIALS ON LEGISLATION. By ARTHUR LENHOFF. [Buffalo, N.Y. : Dennis & Co., Inc. 1949. xxxvii and 1046 pp. $8.]

In its general format and contents this edition of *Craies* follows its predecessors with almost *verbatim* regularity.

A preliminary section contains four chapters on the general principles of construction, drafting, authentication and citation, and classification.

Part I has six chapters which contain a detailed analysis of the traditional rules and canons of construction.

Part II deals with the effect and operation of statutes. It is this section which has required the most extensive revision, particularly Chapter III on Delegated Legislation, which has been entirely rewritten.

Parts III and IV are devoted to penal statutes, and local, personal and private Acts, in so far as these categories of legislation require special treatment.

The three appendices contain respectively, (a) a useful list of the popular titles given to some statutes, (b) the Interpretation Act, 1889, and (c) the Statute of Westminster, 1931 and the Royal and Parliamentary Titles Act, 1927. (Section 1 of the 1927 Act is included although it was repealed by the Statute Law Revision Act, 1950.)

The first general criticism must be directed at the table of "Principal Textbooks Cited" on p. ix, which is nothing more than a lumber-room of odds and ends. Barrington's *Observations on the Statutes* is listed without reference to its edition although the third edition is quoted in a footnote to p. 375. Sometimes a book appears without its relevant edition, and sometimes with neither date nor edition, *e.g.*, Story, *Conflict of Laws*. Moreover, many textbooks which are cited in the main text more frequently than some in this list do not appear at all, *e.g.*, W. A. Robson's *Justice and Administrative Law*, 3rd ed., 1951 (cited at pp. 270, 275, 278 *et seq.*).

In fact, a major weakness of the book is the antiquity of references to books for further reading, *e.g.*, Allen's *Law in the Making* (Oxford, 1930) is cited at p. 275. This was the *second* edition. Similarly, in a reference work of this type the reader may reasonably expect to have his attention drawn to recent articles by authorities on particular topics. Here again *Craies* appears dated. For example, the important and vexing problem of legislation by reference is dismissed in two and a half pages (pp. 26–28). While demands on space may require this cursory treatment, it would assist the reader if a mere footnote reference indicated the existence, for example, of Sir Cecil Carr's authoritative articles on this subject in 22 *Journal of Comparative Legislation* (1940) 3rd series at pp. 12, 191.

A second general criticism concerns the retention of very many passages of the original text which contribute little or nothing to the general argument, and in some cases are clearly misleading. Thus on p. 2 it is stated that Wilberforce's *Statute Law* (1881) had been published "since the first edition of *this work* was begun." The first edition in question was, of course, Hardcastle's own in 1867. Again, in 1952, it is no longer necessary to cite a dictum of Lord Holt in 1704 to the effect that "the preamble of a statute is no part thereof" (p. 187), or the censure of Cockburn C.J. in 1865 against the use of interpretation clauses in statutes (p. 197). Likewise, the modern British reader may prefer not to be reminded of the rules concerning the validity of enactments passed by the "former British colonies, now comprised in the United States"! (pp. 460–1).

It is submitted, with respect to the present learned editor, that a little more drastic pruning of the text would make room for the expansion of some parts of it which are at present rather unduly compressed and for the inclusion of more references to current literature.

There are no innovations of substance in the Introduction and Part I of

this edition. *Craies* is concerned with setting out the so-called rules and canons of construction, and, generally speaking, this is done with remarkable thoroughness. It does not purport to discuss the reasons for, or significance of, any particular judicial statement or decision. Thus, on p. 23, the familiar dictum of Stephen J. in *Re Castioni* [1891] 1 Q.B. 149, at 167, concerning the difficulty of statutory drafting, is followed by a statement by Sir Erskine May to a Parliamentary Committee in 1875. Finally, as an addition to the text, there is a passage from Denning L.J.'s judgment in *Seaford Court Estates, Ltd.* v. *Asher* [1949] 2 K.B. 481, at p. 498, in which the learned Lord Justice expounded his views about the creative function of the judge in "ironing out the creases" in Acts which he is called upon to interpret. It might have been expected that the editor would have appended a comment on this decidedly new approach to the interpretation of legislation by one of Her Majesty's judges. Presumably in the next edition of *Craies* Denning L.J.'s dictum will be followed by the disapproving comments of Lord Simonds in *Magor and St. Mellons R. D. C.* v. *Newport Corpn.* [1951] 2 All E.R. at p. 841, which appeared too late for inclusion in the present edition.

The first chapter of Part II deals with the effect of statutes which create duties. This is particularly valuable to the modern practitioner since litigation concerning the neglect, omission or refusal to perform such statutory duties is becoming increasingly common. From time to time the courts have laid down guiding principles in determining whether or not any particular breach of a statutory duty will give an independent right of action to a person affected by it. Notwithstanding these guiding principles, the chances of correctly advising a client, at first impression, are still hazardous. The truism that cases decided on the provisions of one statute are rarely of much assistance in interpreting another, would have been emphasised if *Atkinson* v. *Newcastle Waterworks,* which is cited on pp. 220–1, had been contrasted with *Dawson* v. *Bingley U. D. C.* [1911] 2 K.B. 149, which is not cited at all. The reference to common employment on p. 228 could now be deleted.

In the preface, Sir Charles Odgers acknowledges his special debt of gratitude to Sir Cecil Carr for his help in redrafting Chapter III on Delegated Legislation. It is therefore rather surprising that this particular chapter is of such unequal quality.

The alleged reasons for the increasing utilisation of delegated legislation might be tabulated on one page instead of interpolating an historical digression between a quotation from Sir Courtenay Ilbert on p. 269 and the further list of reasons given on p. 270.

Most teachers of public law will be surprised to learn that "The name given to delegated legislation is Administrative Law" (p. 270). The existence and functions of the House of Commons Scrutiny Committee, established in 1944, are not mentioned.

When discussing the Statutory Instruments Act, 1946, the editor comes to the remarkable conclusion that Professor Robson's criticism of the lack of publicity attendant on the decisions of *administrative tribunals* "is no doubt largely cured by the Act of 1946" (p. 292). On p. 290, where it is stated that in particular circumstances the 1946 Act provides a defence to proceedings for contravention of a statutory order (*i.e.,* instrument) which had not been published at the time of the contravention, it might have been emphasised that this defence is only applicable to criminal proceedings and not to civil actions. Moreover, to relegate *Johnson* v. *Sargant & Sons* [1918] 1 K.B. 101 to a footnote without any explanation of its significance, is hardly helpful to the busy practitioner. It is surprising that the valuable statement of Scott L.J. in *Sparks* v. *Edward Ash, Ltd.* [1943] K.B. 223, at pp. 228 *et seq.,* is not cited in illustration of the point that a statutory instrument is not invalid on account of unreasonableness (p. 279). Again, although *Liversidge* v. *Anderson* [1942] A.C. 206, is quoted at length (p. 280), no mention is made of the consideration of that case by the Privy Council in *Nakkuda Ali* v. *Jayaratne* [1951] A.C. 66, at p. 76 (see S. A. de Smith in 14 M.L.R. 71).

On p. 287 it is stated (inter alia) that the rules of natural justice require that "an inspector's report should be available." Presumably this "should" is directory rather than mandatory. The footnote reference after this sentence is clearly a misprint, as is the mis-spelling of Dr. C. K. Allen's surname in the footnote on the same page.

Chapter IX of Part II, which deals with the legislation of the Dominions, colonies, protectorates and mandated territories, likewise contains some serious errors of fact. Although since 1949 the Parliament of Canada has had power to amend much of the British North America Act, 1867, it is stated on p. 464 that the Act can be amended only by the Imperial Parliament. Again, on p. 467 (as on p. 404) Australia is said to be the only Dominion now affected by section 10 of the Statute of Westminster, 1931. In fact Australia did adopt sections 2–6 of the statute in 1942. The reader may be excused if he overlooks a footnote to this effect on p. 584. The considerable constitutional changes which have occurred in the last 20 years have rendered pointless the discussion of the cases on pp. 467–85; some are out of date, others misleading.

In spite of these criticisms, *Craies on Statute Law* remains one of the best textbooks in this increasingly important branch of our jurisprudence. As long as the English judiciary purports to interpret modern Acts of Parliament by the application of the traditional canons of construction, many of which were largely elaborated in the construction of private deeds and documents, so long will the practitioner require textbooks which expound those precepts. *Craies* will largely meet that requirement and Sir Charles Odgers is to be congratulated on his heroic rescue of a treatise which was in danger of falling into oblivion.

Turning to the new edition of Sir Charles Odgers' own work on the construction of deeds and statutes, the reviewer faces an easy and pleasant task, for here is a book written especially for students which is unrivalled in its own particular field.

In the careful revising of the text several errors and misprints of the second edition have been removed, more cross-references included, and in one or two instances a rearrangement has been effected. For example, one rule which formerly was treated under the heading of Presumptions now appears with the general canons of statutory interpretation (p. 200). This illustrates the fact that classification in this subject is largely arbitrary and empirical.

Chapter X of Part I contains a most useful exposition of the individual parts of a deed. The author acknowledges his debt to the late Professor Harold Potter, who wrote much of this chapter himself for the second edition. It has now been carefully revised by Mr. T. E. James, also of King's College.

A new short section has been included on the rectification of documents (pp. 54–56) and the sections dealing with penal statutes and delegated legislation have been rewritten. Sir Charles has wisely resisted the temptation to expand his text, and particularly the second half dealing with statutes. The present edition contains 21 pages more than the second and further expansion would inevitably cause an increase in price. This would be unfortunate, in that students (and this *is* primarily a students' book) would be attracted to cheaper but less well conceived books on the subject. Notwithstanding these considerations, it would seem desirable to expand the section on delegated legislation (at present it has only five pages), at the expense, if necessary, of some other sections.

On the other hand, this reviewer welcomes the absence of a special chapter on Wills, although the author joins with Professor Graveson in regretting the omission. We respectfully doubt the wisdom of attempting to turn *Odgers* into a compendium of interpretation. In any event the subject of testamentary construction is *sui generis* and is therefore more properly considered in textbooks and lecture courses on the law of succession. If, in subsequent editions of *Odgers*, it should prove possible to expand the text without increasing its price (which at 30 shillings is dangerously near the prohibitive

mark), the new pages could be more satisfactorily used in expanding the existing sections.

Finally, the publishers and printers are to be congratulated on the pleasing "new look" of this edition. It is printed on better paper and the text is easier on the eye, due in large measure to bolder and more numerous sub-paragraph headings, and the substitution of alphabetical for numerical footnotes.

It is seldom necessary for the reviewer of American casebooks to explain to his English readers the *significance* of the particular subject-matter of the book in question. It is regretted that the same cannot be said about *Legislation.* To the writer's knowledge the subject is unknown as an academic pursuit in English Law Faculties. A student may receive some elementary introduction to statutory interpretation in a general course such as the "English Legal System" in the University of London. This introduction will normally be elaborated in courses on Jurisprudence. Moreover, if his Faculty provides a course in Administrative Law, an all too rare phenomenon, he will learn (inter alia) something about the intricacies of delegated legislation. Constitutional law will also reveal some problems concerning the enactment of statutes and the creation of statutory instruments.

The time is rapidly approaching, however, when some systematic instruction in the problems and techniques of legislation will be found essential for all law-students.

In several of the leading American law schools, courses on legislation are a feature of the curriculum and Professor Lenhoff's casebook is the direct result of his own course at Buffalo University, New York.

Even a superficial perusal of this treatise would convince the most conservative-minded English lawyer that there is more in the study of legislation than statutory interpretation.

In fact, the first half of Professor Lenhoff's treatise is concerned with source materials on the legislative process as such. Professor Lenhoff describes this process as follows: "There is, first, the immensely wide field of legislative policy; next follows the question whether or not, at least as an experiment, a path to the objective should be found through legislation, once a practicable policy has been adopted. In the case of an affirmative answer, issues of ways and means arise: Shall a judicial or an administrative or an arbitral agency or parties' action be used as the proper medium?"

These topics are clearly concerned with statutes in their formative stage. The average English lawyer, and more particularly the English judge, refuses to recognise this formative period as worthy of his attention. It is only when he receives his Queen's Printer's Copy of the Act itself that he turns to consider the measure. Thereafter he regards his sole task to be the interpretation of sections fashioned by others' hands. Surely in no other profession is such disinterest shown by the operative in the production and quality of the working tools with which he is expected to perform his particular task.

Some of the legislative problems which are discussed in Part I of *Lenhoff* are peculiar to the American federal system of government, for example the constitutional limitations on federal legislation and the various formal requirements of the different State constitutions. But other topics are of great interest to the British student of legislation, *e.g.,* Chapter IX on the "Importance of Characterisation of a Statute for the Interpretative Method," and Chapter XV, "The Problem of Definiteness of Statutory Standards for Personal Cónduct."

In Part II, Professor Lenhoff gathers together a valuable body of material for a *critical* study of statutory interpretation. The English reader, accustomed to the orthodox treatment usually given to this subject by English writers, will be surprised by the refreshing and thoughtful approach of American authorities such as Lenhoff. American law inherited the traditional

English rules of statutory interpretation but they have either been applied by American courts more intelligently than by English courts, or have been disregarded as useless criteria in modern circumstances. This approach is exemplified by Lenhoff's statement that "Training in legislation should meet the insistence with which the Supreme Court in its interpretations, particularly in the last 15 years, has relied upon other classifications than those offered by the archaic 'canons of interpretation.'"

Accordingly, in Part II, the student is at once introduced to the defects and limitations of these "canons." Their historical development in English law is admirably illustrated by appropriate material and commentaries. The cardinal "literal rule" is subjected to an intense analysis ("Literal or Teleological Interpretation"; "On Limits set for a Literalist"; "Coincidence of Literal with Logical Interpretation," etc., are chapter headings which vividly illustrate the author's approach) and in subsequent chapters more specialised problems such as the use of legislative history in interpretation are examined.

Professor Lenhoff's casebook is a valuable addition to the limited range of worthwhile books on legislation. Perhaps in the near future, English legal scholars will realise the existence of the present vacuum which exists in our legal literature in this respect—and proceed to fill it.

Eric C. E. Todd.

The Law Relating to The Architect. By E. J. Rimmer, B.Sc., M.Eng., A.M.I.C.E., of Lincoln's Inn, Barrister-at-Law. [London : Stevens & Sons, Ltd. 1952. 244 and xv pp. 35s.]

That the cares of architects go beyond the artistic enclosure of space and the production of *machines pour habiter* becomes apparent from a perusal of Mr. Rimmer's able little book, which treats in a lucid and unpretentious way of the status of the architect and the details of his professional organisation, of the standards he must observe and the legal responsibilities he must fulfil, of his remuneration, his property rights in his work and his arbitral functions.

Such a book as the present, like *Leavis* on the law of advertising, or *Ball* on the law of engineering, lies far on the outskirts of the main conglomerations of commercial and employment law. It is unlikely that it will ever form part of a university law course, unless reference is made to it in some future legal syllabus designed as part of the education of the new technologist. But, its purposed reader is the budding architect, not the embryonic lawyer.

For the modern student of contract, however, the law relating to the architect displays aspects that have an interesting bearing upon the contemporary basis of contract and the contemporary development of contractual doctrines.

The tripartite relationship of architect, client and building contractor is increasingly, if not universally, defined today by the terms of standard contracts and standardised procedures, like *The Standard Method of Measurement of Building Works* agreed between and published by the Chartered Surveyors' Institute and the National Federation of Building Trade Employers (at p. 45).

The contractual instruments used to govern the rights and liabilities of the three main parties are the R.I.B.A. forms of building contracts which, Mr. Rimmer explains, are issued under the sanction of the Royal Institute of British Architects and the National Federation of Building Trade Employers (p. 51). Among their many provisions, which the present book describes, covering the incidence of building agreements, two may be mentioned here.

The R.I.B.A. standard contracts contain clauses which relieve the general contractor from responsibility for the successful execution of the works, for damage to adjoining property and for the risks of encountering unfavourable

physical conditions or artificial obstructions; and which, after final certificate, limit the contractor's responsibility for damage caused by or to the works even though due to the contractor's failure to observe his contractual obligations. The net effect of these clauses is to throw full legal responsibility over on to the architect (p. 29). It would be interesting to learn, in a subsequent edition, how the N.F.B.T.E. has managed to insert so sweeping an exemption and limitation of liability in the standard contracts negotiated between itself and the architects.

And, again, under the R.I.B.A. contracts, provision is made for the payment to the general contractor of advances during the execution of the works, subject to interim certification by the architect (p. 67). Thus are circumvented the awkward common law problems that arose in shipbuilding cases like *Seath* v. *Moore* (1886) 11 App.Cas. 350, or even in nineteenth-century building cases like *Sumpter* v. *Hedges* [1898] 1 Q.B. 673.

One or two other matters of general interest arise from Mr. Rimmer's book. There is, for example, the extent to which publication by the Architects' Registration Council of their decisions on minor and serious professional offences is protected by the law of qualified privilege (p. 166). Also, where the architect prepares the contracts for his client, who has not taken independent legal advice, the client is entitled to rely upon the architect's advice as being reasonable and proper in all the circumstances; and "should the contract documents cast upon the building owner some special responsibility not contained in the common forms or release the contractor from some obligation which is usually taken by him under the common form, a building owner will be entitled, before he enters into the contract, to a clear explanation from the architect as to why he is advised to enter into the contract on the terms proposed" (p. 55). The architect's duty in this respect has probably a legal sanction on the basis of a fiduciary relationship, a matter which the author unfortunately omits to consider; but, in any event, the duty is, interestingly, in the nature of a normative one enjoined by Principles I and IV of the Code of Professional Conduct issued by the Architects' Registration Council.

By and large, Mr. Rimmer's book seems to form an excellent legal textbook for its principally intended readers. It is also useful as a guide to those legal practitioners whose work may take them into this particular specialised field.

C. GRUNFELD.

THE LAW OF MUNICIPAL CONTRACTS WITH ANNOTATED MODEL FORMS. By CHARLES S. RHYNE. With a Foreword by ALBERT H. HALL, Executive Director, National Institute of Governmental Purchasing. [Washington D.C.: National Institute of Municipal Law Officers. 1952. $7.50.]

FOR the English reader this crisply written book should be of considerable interest. The comparative lawyer will see in it a useful source, and the sociologist will find an illustration of the way in which industrial development and business morale are reflected in a very technical side of the law.

"All persons who contract with municipalities must at their peril ascertain the limits on the powers of the municipality's officer or agent with whom they deal" (p. 28). "If certain steps made mandatory by the charter or statute are not complied with, any contract made in such a fashion will be invalid" (p. 29). "It is up to the individual contractor to know whether or not the city must employ competitive bidding in awarding a particular contract. He acts at his own peril as he is presumed to know the law. A contractor may have no recovery, even on a *quantum meruit* basis, if the contract was let without compliance with mandatory competitive bidding requirements" (pp. 35, 36). Lastly, "in most jurisdictions, if such (personal) interest (in a contract) exists,

the contract is void as against public policy," even if the interested party abstained from voting for the contract (pp. 33, 34).

This gives an idea of the searches which contractors are bound to make in the U.S.A., where the law contains no such comforting provision as section 266 (2) of the Local Government Act, 1933, which expressly upholds a contract in similar circumstances. In this country a councillor failing to declare his interest is liable to be fined, but in the U.S.A., it seems, private law is called upon to assist the criminal law sanction against corrupt practices.

No wonder that a branch of lawyers has developed which specialises in giving advice to business firms about to deal with local authorities. It is for this branch of the legal profession that this book has been written, and its members should find it very useful when drafting or scrutinising contracts, which "may run to 100 plus pages (so that) many municipalities have adopted the system of binding all of the contract documents into a book" (p. 45), complete with copies of the resolution authorising the project, the advertisement for bids and other relevant material.

Many of the problems relating to contracts made with local authorities are not new, but for various reasons they have apparently arisen very much more often of late. Labour costs are so high that authorities can no longer afford the employment of their own workmen, and authorities have acquired many new functions the power to exercise which is not necessarily implied. This is true for such things as the testing of motor cars, which involves the purchase of expensive equipment and the housing of ex-servicemen and their families (p. 28).

Specimen contracts printed in the second half of this book afford many an interesting glimpse of conditions in the U.S.A. One clause, for instance, indicates a contrast to building sites in this country which often resemble shack towns in the American film *Grapes of Wrath*; this clause provides that "all temporary facilities, including the contractor's field office . . . , shall be neatly constructed and arranged on the site in an orderly manner" (p. 136).

When closing this informative little volume one cannot, however, help asking oneself—as happens also after the study of other branches of American law—whether, although nothing seems to be left to chance, the price is not unduly heavy, especially since, as the court cases referred to show, nothing like absolute security is achieved.

O. C. GILES.

THE LAW OF QUASI-CONTRACTS. By SIR P. H. WINFIELD. [London: Sweet & Maxwell, Ltd. 1952. xiv and 140 pp. 27s. 6d.]

SELECT LEGAL ESSAYS. By SIR P. H. WINFIELD. [London: Sweet & Maxwell, Ltd. 1952. xv and 292 pp. 37s. 6d.]

QUASI-CONTRACT since Mansfield's day shows signs of arrested development, but Sir Percy Winfield in his masterly survey goes far towards stating it as an orderly series of principles. Although the book packs much detail into short compass, its general philosophy is a vindication of Lord Mansfield's theory of the subject against the implied-contract theory. The learned author seems to regard statutory duties to pay money as not properly quasi-contractual, and this may be the reason why statute law plays no part in the book—not even the Frustrated Contracts Act and the Tortfeasors Act. It seems strange to mention the topic of failure of consideration without the former Act, and the neglect appears to be inconsistent with the fundamental notion that quasi-contract rests upon notions of natural justice rather than upon a fiction of contract by the judges. New statutory remedies may be quite as much inspired by the notion of unjust enrichment as judicial ones, and the two statutes just referred to expressly base recovery upon what is just and equitable.

There will be a wide welcome for the collection of Sir Percy's legal essays,

culled from English and American periodicals by Professor Bailey and his colleagues at Cambridge. The book includes essays on tort, contract, public policy and ethics. Here is the essay on "The Myth of Absolute Liability" which performed the near miracle of inducing lawyers to change their technical language, substituting "strict liability" for the previous "absolute liability." The essay on "The Foundation of Liability in Tort" is included, and the trio on negligence. If the book comes to be reprinted the three articles on quasi-contract might well be omitted, because these are now superseded by the monograph.

Glanville Williams.

An Introduction to the Principles of Land Law. Third Edition. By A. D. Hargreaves. [London: Sweet & Maxwell, Ltd. 1952. xvi and 208 pp. (with index). 25s. net.]

The established success of this little book can be taken as evidence that teachers share the author's belief that "land law can be explained as well as taught." In so far as land law is explicable (at least, in a short compass), Professor Hargreaves has explained it, methodically and lucidly. Indeed, the lucidity is the result of his determination to avoid superficially easy explanations and to go direct to the genuine history; truth may be stranger than fiction but it is also more convincing in the long run.

How the author contrives to get so much history as well as law into 200 pages is a mystery to be received with thankfulness. The text has been brought up to date and by now is almost clear of misprints; there is one on p. 161, line 6, "legal equitable rights." The very brief reading lists are well chosen; to that appended to Chap. I it is now possible to add F. L. Ganshof's *Feudalism*, which appeared too late for inclusion.

T. F. T. P.

Private International Law. Fourth Edition By G. C. Cheshire, D.C.L. [Oxford University Press. 1952. l and 687 pp. (including index). Price £2 10s.]

Cheshire started in 1935 as a book of some 580 pages "to provide students with a shorter account of the subject than most of those already published." This shorter account grew in the second edition, inevitably called for in 1938, to 692 pages. The first post-war edition in 1947 had grown to 884 pages. Now, in 1952, the size of each page has been increased almost to the size of the pages in the author's famous book on Real Property; the number of pages has in consequence been cut down to 687 pages. The book is no longer only a students' book; it is also, we suggest, a treatise that now ranks with the work of those the author calls "such great masters as Dicey and Westlake." Cheshire is cited in courts, and Cheshire himself, who has ceased to teach students, except at the Inns of Court, has become an international figure in the field of "Conflicts." The reviewer's task is in consequence mainly one of dotting i's and crossing t's and pointing out where he himself differs from the master.

We agree with the author (p. 40) that "a right enforced in England may differ from that recognised in its country of origin," but, unlike Cheshire, we do not regard the decision in *Machado* v. *Fontes* as regrettable on the ground that it enlarges or alters the substantive right given by the *lex loci*. It is difficult to see how English judges could do other than apply English standards of compensation if they adhere to their very sensible conception of the nature

of man and his rights, and keep their oath to protect that conception. Unduly low local standards of treatment are not a complete answer to the infringement of the international objective minimum standards in public international law; there is no reason why they should be accepted in private international law.

We agree with the author that in the field of contract unrestricted freedom to choose a law is "indefensible in principle and misguided in policy." We agree that, despite the *Vita Case*, a system of law is not at the beck and call of parties to a contract, but when they do choose a forum we suggest they must accept its ruling on both the extent and the content of their claims, and as much in contract as in tort.

Cheshire rightly stresses the English tenderness towards arbitration clauses, especially towards those providing for arbitration by the great trade associations in London. It is odd to recall that arbitration was contrary to the policy of common law; for arbitration might, at one time, have interfered with the successful competition of the common law courts with the courts of the law merchant. The statutory introduction of arbitration into English law has, however, now found its counterpart abroad, and the Arbitration (Foreign Awards) Act, 1930, mentioned at p. 14, was evidence of the new and increasing interest in arbitration. Indeed, both the International Chamber of Commerce and the International Institute for the Unification of Private Law are engaged in further studies to facilitate the law of international arbitrations in private law (pp. 14 and 597), and Dr. Domke has done yeoman service in this field in the U.S.A.

It is an astonishing fact that the law governing capacity to make a mercantile contract is still "a matter of speculation" (p. 212). Incidentally, the Infants Relief Act, 1874 does not specifically refer to "persons under 21" as might possibly be assumed from p. 213 but to "infants." The term "infant" is still open for construction by the court.

We agree that illegality by the *lex loci solutionis* is not necessarily final: especially now that there is so much arbitrary interference by governments in contractual affairs. We suggest that where the foreign legislation, making the contract, or its performance, illegal, is of a penal or political character, it may be disregarded in England, providing it does not amount to frustration of the contract. A contract of sale of goods becomes enforceable by the seller once the purchase-money becomes due and it does not much matter if a purchaser cannot, because of the imposition of a foreign quota or embargo, take delivery of the goods; but when the price is not due and nothing has been received by the seller, the action of a foreign legislature may have the effect of frustrating a contract. In this case an Englishman carrying on his business from this country may be in an unfortunate position indeed, since his only course may be to sell goods he has manufactured at a considerable loss, and when he has not received some part-payment or benefit the Frustrated Contracts Act will not help him. Perhaps it is time English law was changed.

Another problem ventilated by Dr. Cheshire is that of the revalorisation of debts. He rightly points out that here English courts so far have accepted the proper law contract as a guide in this matter, but this does not seem to lead to happy results; too often it denies a creditor, payable in England in foreign currency, the benefit of foreign legislation improving the value of that currency by revalorisation. The unsatisfactory and generally criticised decision in *Kahler* v. *Midland Bank* [1950] A.C. 24, is, fortunately, based on foreign law, which is a question of fact, and therefore does not give rise to a binding precedent. In the reviewer's opinion the demands of the proper law contract should not be pushed so far as to deny a creditor the right to benefit from revalorisation, or to enable a foreign penal or revenue law to be applied by an English court called in to lend its assistance to a claimant.

The chapters on movables and immovables are very full, as one would expect from the writer of the leading textbook on the law of property, some 160 pages being devoted to these subjects. Cheshire regards the *lex situs* as

deciding what is a movable or immovable, but we are not sure that this is always logically satisfying, since the ownership of territory and the jurisdiction in respect thereof may themselves occasionally be in doubt. We suggest that, as a final resort, such matters can only be settled by public international law governing the acquisition of territory. Pending a settlement of dispute on claims to territory we can only suggest that each forum will apply its own conceptions. We are not sure that the difficulties alluded to on p. 437 about the *lex actus* and the *lex situs* are satisfactorily resolved by saying that, between the parties, the *lex actus* determines when the property has passed to the buyer. It seems to us clear that if property connotes possession it is rather the other way round; since the forum which has physical power over the thing in dispute is the court of the situs; though of course the *lex actus* may be relevant in connection with any claim for damages for breach of contract. The rule in *Cammell* v. *Sewell* is taken as deciding "that a man loses his ownership of goods if they are taken to another country and there transferred in circumstances sufficient by the local law to pass a valid title to the transferee" (p. 444). We should prefer to add that the title so gained may only be a territorial one, and that where that title arises from a violation of public international law it has no claim to international recognition. If the *lex situs* is supreme, then, on a change of situs, the new *lex situs* may refuse recognition either on grounds of violation of international law, or even on the ground that the recognition would be contrary to its public policy. The Allied Declaration against forced transfers to Nazis in occupied territory covered "transactions apparently legal in form." It has been acted on in many places.

With regard to the difficult problem of assignment of goods *in transitu*, we prefer to think of the usual C.I.F. or F.O.B. contracts as sales of documents; such a view may simplify what would otherwise be an extremely complicated problem.

We are glad to see, at p. 469, that Dr. Cheshire is in favour of a widespread unification of the law of negotiable instruments. We understand that steps are now being taken with regard to this. Professor Yntema, in collaboration with the International Institute for the Unification of Private Law, of which he is a Governor, is going into the possible rapprochement of the Anglo-American and the European uniform systems. The treatment of the situs and assignment of shares might possibly have included a reference to the *Blonde Case* [1947] A.C. 24. Incidentally, Mr. Steiner, of the London School of Economics, has written an excellent thesis on these matters. The question of assignment on marriage shows the author's predilection for the matrimonial domicile, though we agree that this is not conclusive, in view of the *Duke of Marlborough's Case* (p. 506); the decision in *De Nicols* v. *Curlier* can also be explained by the fact that French law created a hypothèque légale in favour of the wife. The complicated rules concerning matrimonial clauses are set out in a hundred pages quite admirably written and preceded by an excellent outline of the chapter at p. 279, done in a manner for which Cheshire's writings are famous. We strongly recommend this book to every student in this field of learning which statute law has complicated quite unnecessarily, and in which legislative tinkering has produced many anomalies, especially in respect of the jurisdiction accorded to foreign courts, as Cheshire points out (p. 261). The question of domicile is reviewed critically in Chapter 7 and needs to be thought out again. One happy consequence of The Hague Conference on Private International Law of 1952 is that Dr. Cheshire has been made a member of a Lord Chancellor's Committee to review the whole subject of domicile. Certainly the law of domicile could well be put into a short, clear code with advantage to everyone, and to the exclusion of some of the anomalies now produced by an insistence on the theoretical concept of the domicile of origin.

The great value of this leading textbook is its frank discussion of the difficulties inherent in the subject: discussion such as this sharpens the mind

whilst incidentally reviewing the whole of English law. Whether we like it or not, the subject of private international law is going to be more and more vital, it is going to be linked more and more with public international law. Indeed, the "treaty" side of the subject is growing daily and is going to call for increasing attention. It is to be hoped that Sir Arnold McNair's plea to the Society of Public Teachers of Law for a wider study of public international law will result in a further marrying of public with private international law; perhaps the match-maker will be Dr. Cheshire?

B. A. Wortley.

Internationales Konfiskations- und Enteignungsrecht. By Ignaz Seidl-Hohenveldern. [Berlin: Walter de Gruyter & Co. Tubingen: J. C. B. Mohr (Paul Siebeck). 1952. xiv and 211 pp. Price: not stated.]

This is a very useful and welcome book on the international effects of confiscation. The author, who holds a high position in the office of the Austrian Chancellery and is a Reader at the University of Vienna, is entitled to gratitude for a scholarly monograph on a branch of law which is of great practical importance.

The author clearly distinguishes between confiscation (the taking of property without compensation) and expropriation (the taking of property subject to the payment of full compensation). In both connections he makes the familiar further distinction between the taking of property within the territory of the State and the taking of property situate outside such territory (see in particular Chapters 2 and 3). The author further deals with the problem of the situation of ships and intangible property (Chapter 4) and the confiscation of companies (Chapter 5) and in Chapter 6 he discusses some special cases, particularly treaties which seem to involve the recognition of the extraterritorial effects of confiscation. Chapter 7 is devoted to the important subject of "quasi-confiscation," such as taxation, bankruptcy, exchange control and devaluation. Finally, Chapter 8 deals with the specific aspects of expropriation.

Dr. Seidl-Hohenveldern has made extensive use of comparative material, though he has frequently been compelled to quote decisions, not from the original report, but from their discussion by other writers. This sometimes leads to minor inaccuracies, but does not prejudice the value of the work or the broad picture which it sketches and which leaves no doubt that the guiding principles of the law of confiscation are firmly established in the practice of the civilised world. The real problems arise from the border-line cases and for this reason Chapters 5, 6 and 7 are of special interest.

Dr. Seidl-Hohenveldern takes the position that confiscation must primarily be regarded from the point of view of three legal principles, *viz.* the sacrosanctity of the foreign act of State, public policy and the principle of territoriality which in truth is a rule of private international law. All three ideas have unquestionably influenced the law of confiscation. But whether the last-mentioned principle is not sufficient and whether the other methods of approach should not be discarded, is a question to which the author does not give an answer.

According to Dr. Seidl-Hohenveldern, confiscation of property situate within the confiscating State must be recognised even if the owner is an alien (pp. 35–37). Although this view is supported by strong authority, it must be regretted that so progressive and thoughtful an author continues to adhere to the dualistic theory of international law.

F. A. Mann.

MANUAL OF INTERNATIONAL LAW. By G. SCHWARZENBERGER, PH.D., DR.JUR., Reader in International Law in the University of London. Third Edition. [London: Stevens & Sons, Ltd. 1952. 32s. 6d. net.]

THE third edition of this book incorporates all the more important developments since the last edition in 1950, together with a number of new cases, treaties, statutes and more recent literature. Dr. Schwarzenberger is to be congratulated on successfully resisting the invariable tendency towards expansion; the work remains one of just over 400 pages.

Part One contains the main text of the manual, and in 163 pages deals with the law of Peace, of War and Neutrality, and of International Institutions. The treatment is necessarily cursory, but this disadvantage is to a large extent offset by the fact that Part Two of the book is devoted to Study Outlines, a list of questions which aims at developing the right sort of approach to problems which are often merely indicated in the main text. The inclusion of a detailed bibliography, and of case citations as an appendix to each question enables the student to supplement the outline of the particular topic contained in the text according to his own needs, and for his further assistance the author has discriminated between cases, whilst avoiding the more invidious task of indicating any priority in the bibliography. In addition there is, in Part Three, a further bibliography under the title of "Material for Further Reference." As appendices to the book there are given the Charter of the United Nations, the Statute of the International Court of Justice and a list of the Members of the principal organs of the United Nations; the usefulness of this last addition to students cannot be over-emphasised.

Whether the inductive approach, at this stage of development of the law, is entirely satisfactory remains controversial; yet one can sympathise with this reaction against a too optimistic, *a priori* approach which is condemned as "sympathetic day-dreaming" (p. 141). Dr. Schwarzenberger's viewpoint, which may to some appear pessimistic, may well appear realistic to others, and one cannot doubt the wide agreement which the following statement will find:

> "International relations are primarily based on the self-interest of the powers and on the various patterns of conduct which, almost of necessity, emerge in an environment conditioned by power politics" (p. 4).

The treatment of the law of Recognition is characteristic of this attitude, but, in relation to the recognition of States, some reference to the possible impact on State practice of Art. 4 of the Charter might not be out of place.

The argument for including some treatment of the law of War and Neutrality is forcibly made. In referring to the position under the present law of compulsory measures short of war the author states that by Art. 2 (4) of the Charter "the matter is settled unequivocally" and that "thus reprisals amounting to a threat or use of military force, and applied between individual States, are declared illegal by the Charter of the United Nations" (p. 82). This view is by no means universally accepted, and the student may be deluded by these categorical statements into that precise "day-dreaming" to which Dr. Schwarzenberger so rightly objects. Later, in dealing with the distinction between civilians and armed forces, we find the statement that "The distinction does not assist in determining the scope of legitimate bombardment from the air . . ." (p. 87). Yet in relation to sea warfare, referring to the principle that the laws of maritime warfare are binding irrespective of the weapons used, Dr. Schwarzenberger says " . . . the *ratio legis* is the same in the case of surface men-of-war, submarines and aircraft, and applies today as much as ever before: the protection of non-combatants" (p. 90). It is difficult to appreciate the difference between air warfare and sea warfare which makes this fundamental distinction between civilians and combatants

irrelevant in the one case and relevant in the other, despite the growing tendency towards assimilation under modern conditions of warfare.

These criticisms, however, must all rest on a difference of opinion and not on any accusation of inaccuracy, for the book is a careful and thoughtful treatment of a subject which bristles with controversy. The manual remains a valuable source of study for the uninitiated and the learned, and the brief conclusion in which the author offers a subjective evaluation of the present position in international society affords an admirable basis for informed discussion.

D. W. BOWETT.

THE CASE LAW OF THE INTERNATIONAL COURT. By E. HAMBRO. [Leyden : Sijthoff. 1952. vii and 699 pp. Fl.42.50.]

A SURVEY of *The Case Law of the International Court* may be presented in various ways. Thus there is the method employed in the *Fontes Juris Gentium*. This has formed the model for Dr. Hambro's compilation, which consists of statements by the World Court on various points of law. Others may prefer the method of Professor Lauterpacht whose object, in his *Development of Law by the Permanent Court of International Justice,* was "to examine, in terms of some typical problems of the judicial function, the principal tendencies which have distinguished the work of the Court," without attempting to give "anything like a complete picture either of the work of the Court or of the body of law which it has had occasion to apply and to clarify." Yet a third approach was employed by Dr. Schwarzenberger in his *International Law as Applied by International Courts and Tribunals,* which enabled readers to estimate the true worth of the work of the World Court in applying and interpreting the rules of international law.

In the last few years the significance of the inductive approach to international law has become widely recognised and the importance of the World Court as an agency for determining the rules of international law is now fully established. Nobody writing on any aspect of international law can afford to overlook the activities of the World Court, and on many matters dissenting and separate opinions are almost as important as the majority judgment. In seeking to establish a *jurisprudence constante,* however, the practice of the World Court indicates that only the opinions of the majority are of significance.

By the end of 1951, the judgments, opinions and orders of the Court covered some 2,240 pages, of which no adequate index existed. Such a quantity of material was more frightening than helpful, and the Registrar is to be congratulated on having produced "A Repertoire of the Judgments, Advisory Opinions and Orders of the Permanent Court of International Justice and of the International Court of Justice," although far more attention has been paid to the activities of the latter than to its predecessor, and there is at times a clear indication of the Registrar's subjective approach to the activities of the World Court in the selection of his extracts.

Under four main headings—Sources of International Law; Persons in International Law and their Attributions; The Peaceful Settlement of Disputes; and Conflicts, War, Neutrality—Dr. Hambro has collected the comments of, primarily, the International Court of Justice and, to a far less extent, of its predecessor on those aspects of international law which have come before The Hague Court for consideration. It is interesting to note some of the matters on which the Court has had little or nothing to say. The Court has been silent on the rights and privileges of diplomatic representatives, but it has made some comments on problems of recognition, although there is no hint of this in the index of Dr. Hambro's work, or in any of its separate sections. There is but little in the book on State Responsibility, and what there is comes from the Corfu Channel judgment. The same is true of

"Conflicts" in Part IV. This section is devoted to the Court's discussion of "Intervention" in the same case. Of the 40 pages devoted to the position of individuals, 16 relate to the *Asylum Case* and six to the problem of functional protection as enunciated in the opinion arising from the Bernadotte murder. For some reason Dr. Hambro has felt it necessary to separate the entries on "Functional Protection"—Part K of the chapter on Persons in International Law—from those on "Agents of the United Nations"—Part I of the chapter on International Organisations—although all the entries in both sections are from the same advisory opinion. There is a cross-reference, but it might have been more useful if all the entries had been together under "Agents of the United Nations."

In his first chapter, when discussing the effects of treaties on third parties, Dr. Hambro rightly draws attention to the comments of the Court in its opinion on *Reparation for Injuries Suffered in the Service of the United Nations* concerning the ability of the members of the United Nations to create an international institution possessing objective personality even for non-members regardless of recognition. He does not, however, mention the comments of the Court in the opinion concerning the *Status of Eastern Carelia*, when the League Covenant was not applied against non-members. The Eastern Carelia issue is mentioned on the nature of advisory opinions and on pacific settlement by consent, but there is no hint that the Court also considered the position of non-members of the League of Nations. There is likewise no specific reference in the section on the United Nations to the position of the non-member, although there is a cross-reference to the *Reparations Case* already cited.

Such omissions, however, do not detract from the usefulness of Dr. Hambro's work, which is enhanced by the addition of a detailed bibliography covering 120 pages and listing 1,725 items. To complete the work and render it an instrument of research there is also an index of over 50 pages, but as has been indicated there is no entry on recognition even though some of the Court's comments on this problem are included in the book. It is to be hoped that some day Dr. Hambro will find the time to provide a companion *Repertoire* of the dissenting and separate judgments and opinions, the significance of which he has already indicated in his Introduction.

L. C. Green.

Oxford Junior Encyclopaedia. Vol. 10: Law and Order. Edited by J. MacInnes. [Oxford University Press: Geoffrey Cumberlege. 1952. xvi and 496 pp. 30s.]

This volume contains much more than is implied by its title. The main subsidiary headings are World Affairs, Government, Justice, Armed Forces, Public Services and Local Government, yet even these do not convey the diversity of subject-matter. The production is excellent: good paper, clear type and a large number of photographs and other illustrations.

In a work of this size some inaccuracies must appear. I make no claim to have read all the titles and it may be that I was unfortunate in finding what seems to me to be a high proportion of errors for an encyclopaedia. Thus it is not true that the "Kangaroo" is only available at Report stage (p. 3); there is nothing to prevent a member of the National Coal Board standing for Parliament (p. 192); it is not a general rule that a Member of Parliament must remain seated and be covered before he raises a point of order (p. 194); local authorities began to build housing estates long before the 1920s (p. 198); there is no provision that "a proportion" of council houses may be sold (p. 200); the Landlord and Tenant (Rent Control) Act was passed in 1949 (p. 369). There are a number of statements which are not particularly helpful or are misleading. These include: "As a whole, assassination has been a weapon much more used in European history than in English" (p. 47); "slander is not in

permanent form as, for example, gossip" (p. 240); it is unfair and inaccurate to attribute the unpopularity of the Poor Law Commission wholly or even primarily to Chadwick's "mishandling" (p. 244). Perhaps the last type of error one expects to see in an Encyclopaedia is a common fallacy on a current subject. Yet it is said of the National Health Service: "It provides all those who take advantage of it with free medical and hospital treatment. The cost is met partly by contributions from the Treasury and partly by compulsory contributions from all citizens, except certain people who are exempt from payment, whether or not they take advantage of the service" (p. 286). The possibility that this is merely a misleading way of referring to the lump sum payments out of the National Insurance Fund to the health service disappears when the reader finds, under the same title: "The National Health Service Act, 1946 . . . together with the National Insurance Act of the same year, took the place of the National Health Insurance Act. The funds are obtained in the same way as before, and the employers' and workers' contributions are still made by the purchase of stamps by the employer" (p. 287). The impression grows that the proofs were not checked by anyone except the writers.

Apart from these shortcomings, the volume is a considerable achievement and the price is most reasonable.

J. A. G. GRIFFITH.

THE AMERICAN JOURNAL OF COMPARATIVE LAW. A Quarterly. Vol. 1, Nos. 1–4.

THE appearance of a new law journal is no doubt less of an event in the U.S.A. than it is here, but in view of the outstanding work which has been done in that country of recent years in comparative law the absence of such a periodical has been a very obvious gap in their legal literature. We in England therefore welcome most heartily *The American Journal of Comparative Law* which comes out under the distinguished editorship of Professor Hessel E. Yntema, supported by a board of specialists in the subject whose names furnish a warranty of high quality, a warranty which is certainly implemented in the first volume which appeared in 1952.

Its make-up consists of articles, documents, notes and comments, digest of foreign law cases, and book reviews, notices, etc. The first issue which contains the first two numbers naturally contains a good deal of material of an introductory character, including a masterly historical survey by Roscoe Pound, and an exposé of the purposes which the Editorial Board have in view by Professor Yntema. Professor Myres McDougal writes on the Comparative Study of Law for Policy Purposes in his usual stimulating manner. There is a particularly useful article on the recent developments in connection with the project for a uniform sales law from the authoritative pen of Professor Rabel, a useful analysis of that mysterious two-limbed tribunal the new German constitutional court by Professor von Mehren, and a critical survey of the existing literature on Comparative Law by Professor Rheinstein.

The later numbers contain articles on collective bargaining in France and Germany, on procedure in Italy, on the Scandinavian law of torts written from the point of view of the impact of insurance thereupon, a technical article which should be of great value to practitioners on "autonomy" in choice of law by Professor Yntema, and another which is likely to be of similar value to teachers of the subject by Professor Re.

A feature of much interest and value is the section devoted to the reprinting of documents of outstanding importance in comparative law, or of translations of them when the originals are not in English. Among those which are given in this volume are the draft of the convention for the international uniform code on sale of goods, and that prepared in connection with a project for the codification of the French rules on Conflict of Laws.

Altogether, the volume is an interesting, stimulating and encouraging piece of work. We wish the journal all success, and express the confident hope that it will go on from strength to strength.

C.

THE PAKISTAN LAW REVIEW. [Vol. 1, No. 1.]

We are very glad to welcome the first number of a new law review from Pakistan. Significantly it carries the general title "Justice and the Common Man," and the whole issue convinces us that those who are responsible for the policy of the review are persuaded of the need for a moral basis in the administration of justice. The Editorial Board are members of the Sind Muslim Law College at Karachi, which is evidently a lively and enterprising school of law.

Among the contents of an interesting number which is by no means confined to the discussion of technical legal problems may be noted in particular a verbatim copy of the Objectives Resolution adopted by the Pakistan Constituent Assembly as the basis for the new Pakistan Constitution. It has the strong religious and ethical tone which one would expect in a predominantly Muslim State. To this is appended "Thoughts on our Constitutional Problems" and some addresses given at the Hyderabad Bar Conference, which strike a similar note. One cannot help also appreciating the obvious respect and affection which these Pakistani lawyers have for the common law and its method of approach to juristic problems. Such an article as Mr. Brohi's "The Hearsay Rule and Pakistan Evidence Act," could only have been written by one who has absorbed the common law attitude towards the problems of evidence. One is glad to notice that Mr. Brohi has become Advocate-General of Sind. And how valuable it is that one of our own eminent judges, Sir Henry Wynn-Parry, should be able to visit Pakistan and give the colourful and interesting address on the "Customs and Traditions of the English Bar," which is here reproduced.

We of *The Modern Law Review* wish long life and prosperity to *The Pakistan Law Review.*

C.

YOUR FAMILY AND THE LAW. By ROBERT S. W. POLLARD. [London : Thrift Books, C. A. Watts & Co., Ltd. 1952. 90 pp. 1s.]

IT is indeed a treat for a reviewer to meet a book which he can unreservedly praise as cheap. Although this book is in paper covers it is well printed on reasonably good paper and is amazingly good value for 1s. The author, who will be well known to most of our readers, has succeeded admirably in packing a great deal of useful information into his 90 pages and in ventilating his views on the defects of our present divorce law. The book may be cordially recommended to the lay public for whom it is primarily intended, and will also repay perusal by lawyers.

L. C. B. GOWER.

Books and Publications Received:—

AN INDEX TO THE AUSTRALIAN LAW JOURNAL. Vols. 1–25 (1927–1952). Compiled by R. ELSE-MITCHELL, LL.B. [The Law Book Co. of Australasia Pty., Ltd. 284 pp.]

REPORT OF THE INTERNATIONAL LAW COMMISSION, covering the work of its Fourth Session. (General Assembly Official Records, 7th Session, Supplement No. 9.) [H.M. Stationery Office. 1952. 1s.]

CLERK AND LINDSELL ON THE LAW OF TORTS. Tenth Edition. Fifth Cumulative Supplement (to August 31, 1952). By B. COWDEROY. [London: Sweet & Maxwell, Ltd. 6s. net. (Book and Supplement £4.)]

CHITTY'S TREATISE ON THE LAW OF CONTRACTS. Twentieth Edition. Fifth Cumulative Supplement (to August 31, 1952). By BARRY CHEDLOW. [London: Sweet & Maxwell, Ltd. 6s. net. (Book and Supplement £4.)]

CONDITIONS OF SALE FOR DAIRY AND STORE CATTLE AT MARKETS. [Published by the Chartered Auctioneers' and Estate Agents' Institute. 1952. 19 pp. 1s.]

RECENT DEVELOPMENTS IN THE LAW OF OBSCENE LIBEL IN ENGLAND. By ALEC CRAIG. Reprinted from the *International Journal of Sexology*. May, 1952.

ENCYCLOPAEDIA OF PLANNING, COMPULSORY PURCHASE AND COMPENSATION. Vol. I—Planning. Revision 14—November 1, 1952; Vol. II—Compulsory Purchase and Compensation. Revision 10—November 1, 1952.

UNDERHILL'S LAW RELATING TO TRUSTS AND TRUSTEES. Second Cumulative Supplement to Tenth Edition. By M. M. WELLS, M.A. [Butterworth & Co., Ltd. xiv and 18 pp. Main Work and Supplement 87s. 6d. net. Supplement alone 5s. net., by post 4d. extra. November 12, 1952.]

GREEN'S DEATH DUTIES. Supplement to Third Edition. By H. W. HEWITT, LL.B. [Butterworth & Co., Ltd. viii and 11 pp. Main Work and Supplement 75s. net. Supplement alone 5s. net. by post 3d. extra. November 14, 1952.]

LEWIN ON TRUSTS. Fifteenth Edition. Second Cumulative Supplement (To January 1, 1953). By I. GOLDSMITH. [Sweet & Maxwell, Ltd. 5s. net.]

WEAVING'S NOTES ON BANKRUPTCY PRACTICE AND PROCEDURE IN COUNTY COURTS. By THOMAS S. HUMPHREYS. Second Edition, 1953. Oyez Practice Notes No. 32. [The Solicitors' Law Stationery Society, Ltd. 6s. net.]

ENCYCLOPAEDIA OF PLANNING, COMPULSORY PURCHASE AND COMPENSATION. Vol. I.—Planning. Revision 15, March 16, 1953. Vol. II.—Compulsory Purchase and Compensation. Revisions 11 to 15, March 16, 1953.

PUFFS, BALLOONS AND SMOKEBALLS. By A. LAWRENCE POLAK. Illustrated by LESLIE STARKE. [Little London, Chichester, Sussex: Justice of the Peace, Ltd. 1952. 12s. 6d. net; 10s. 6d. cheap edition.]

ARE FINDINGS KEEPINGS? : AND OTHER STORIES FROM THE LAW FOR YOUNG PEOPLE. By CLAUD MULLINS. [Frederick Muller, Ltd. 10s. 6d. net.]

THE ELEMENTS OF INCOME TAX. Second Edition. By C. N. BEATTIE. [Stevens & Sons, Ltd. 1953. xxxii and 208 pp. 25s. net.]

CURRENT LAW YEAR BOOK, 1952. Gen. Editor: JOHN BURKE. 50s. net.

A FIRST BOOK OF ENGLISH LAW. Second Edition. By O. HOOD PHILLIPS. [Sweet & Maxwell, Ltd. 1953. xxiv and 298 pp. 17s. 6d. net.]

LEARNING THE LAW. Fourth Edition. By GLANVILLE L. WILLIAMS [Stevens & Sons, Ltd. 1953. xiv and 210 pp. 12s. 6d. net.]

LE DROIT COMPARE. Par H. C. GUTTERIDGE. [Paris: R. Pichou et R. Durand-Auzias, 20 Rue Soufflot. 1953. 239 pp.]

THE CONSTITUTIONAL PRIVILEGE IN OPERATION. By LEONARD B. BAUDIN. Reprinted from the Lawyers Guild Review, Vol. XII, No. 3, Summer 1952.

INTERNATIONAL POLITICAL SCIENCE ABSTRACTS. Vol. II, Nos. 1–4, 1952. Published by Unesco. 19 avenue Kléber, Paris 16e.

RIGHTS AFFECTING THE MANUFACTURE AND USE OF GRAMOPHONE RECORDS. By WILLEM MAK. ['s Gravenhage: Martinus Nijhoff. 1952. 224 pp.]

THE YEAR BOOK OF WORLD AFFAIRS, 1953. Vol. 7. Published under the auspices of the London Institute of World Affairs. [Stevens & Sons, Ltd. vi and 427 pp. £2 2s. net.]

CORRESPONDENCE

A LEARNED contributor writes as follows:—

In the issue of January last at p. 128 Dr. E. J. Cohn, reviewing the book *Das Zivilgesetzbuch von Griechenland* (1940) *mit dem Einführungsgesetz*, translated and introduced by Demetrios Gogos, made certain comments with regard to the provisions of the Greek Civil Code, which give further currency to certain inaccuracies or misapprehensions which have been expressed on other occasions, even by Greek lawyers.

Dr. Cohn argues that the Greek Civil Code is substantially nothing but the German Civil Code brought up to date and adapted to the national and social conditions of Greece, and he rejects the view that the similarities of both codes are due in fact to their common background the Roman law. This, it is submitted, is incorrect and not supported by the instances which he quotes.

One of the arguments used by Dr. Cohn is that the Greek Civil Code introduced from the German Civil Code, section 242, concerning good faith in the law of contract. But this principle was established and repeatedly confirmed by the Byzantine-Roman law and accordingly was in force in Greece before the introduction of the Code (*Vide* : 30 Institutiones IV, 6 Const. 3 Code III, 38, Lex 48 Pand. XIX in fine, Lex 7 1 Pand. XVIII, 5, Const. 4 Code IV, 10).

Dr. Cohn further argues that the Greek Civil Code introduced what he calls the " peculiar " rule of section 388 (adjustment of the contract because of unexpected and exceptional events). But this rule does not in fact exist in the German Civil Code. It was established as the result of the work of eminent European jurists and incorporated into jurisprudence only after the war of 1914. On the other hand the rule does not seem " peculiar " to all Continental lawyers, it is to be found in the Polish Code of 1933, s. 269, and after the Greek Code it was also adopted by the new Italian Code (s. 1467).

Furthermore Dr. Cohn is incorrect in asserting that the rule of section 1036 of the Greek Code is borrowed from the German Code. This rule is the expression of the principle " *en fait de meubles possession vaut titre*," which principle was introduced into the laws of many European countries, long before the introduction of the German Code. The 1874 draft of the Greek Code accepted the principle in section 621, and English law in many cases recognises the transfer of property of movables from the non-owner to the bona fide purchaser for value. Therefore this principle would appear to be general in European law and in no sense peculiar to the German law.

Again, it is inaccurate to state, as does Dr. Cohn, that the law relating to commorientes, section 88, Greek Code, is derived from the German Act of 1939 relating to missing persons, for long before that Act or the German Civil Code these provisions had been formulated by legal scholarship and had been introduced into the legislation of many European countries (Austrian Code of 1811, s. 25—Swiss Civil Code, s. 32 at p. 2).

It is therefore submitted that Dr. Cohn is mistaken in refusing to recognise that the similarity (which admittedly exists) of the provisions of both the Greek and German Civil Codes is due to the indisputable fact that both countries before the introduction of their Codes were governed by the Byzantine-Roman law. The Greek Code in fact does not contain any institution or custom directly imported from a foreign source, with the exception of an institution similar to the English grant of Letters of Administration, which Dr. Cohn does not mention. The position of the Greek Code is therefore totally different from the reception of the Swiss Code by Turkey, governed until then by the Muslim law, to which Dr. Cohn compares it.

A. KLAPEAS

Dr. Cohn replies:—

I must indeed fully maintain that the similarities between the Greek and the German Civil Code are not due to their common background, the *usus modernus Pandectarum*. This common background could explain identity of ideas. It cannot explain either the striking similarity of the arrangement of the material or the even more striking fact that a very large number of rules of the Greek Code are literal translations of the respective rules of the German Civil Code. It would be easy to make a list of hundreds of such rules which literally correspond to each other. I shall confine myself to a mere 20, all taken from that part of the German and Greek Civil Code, which has been considered by every comparative lawyer as the most characteristic achievement of the German legislator, *i.e.*, the "General Part": German Code § 133 = Greek Code § 173 (interpretation of transactions), German § 134 = Greek § 174 (nullity of illegal transactions), German § 138 (1) = Greek § 178 (nullity of immoral transactions), German § 138 (2) = Greek § 179 (nullity of usurious transactions), German § 139 = Greek § 181 (partial nullity of transaction), German § 140 = Greek § 182 (conversion of void transactions), German § 141 = Greek § 183 (confirmation of void transactions), German § 146 = Greek § 187 (cessation of binding force of offer), German § 156 = Greek § 199 (auction), German § 157 = Greek § 200 (interpretation of contracts), German § 162 = Greek § 207 (fictitious implementation of conditions), German § 163 = Greek § 210 (periods in contractual terms), German § 164 (1) = Greek § 211 (1) and German § 164 (3) = Greek § 211 (2) (representation by agents), German § 174 (1) = Greek § 226 (unilateral transaction without submission of written power), German § 177 (1) = Greek § 229 (unauthorised representation), German § 179 (1) = Greek § 231 (warranty of authority), German § 179 (2) = Greek § 231 (2) (innocent representative without authority), German § 179 (3) first sentence = Greek § 231 (3) (third party's knowledge or lack of authority), German § 181 = Greek § 235 (1) (self-contracting by agent). The "European jurists" who have developed the rule, which has been so well expressed in section 388 of the Greek Civil Code, are *Windscheid* and *Oertmann*. Section 288 of the Greek Code is a literal translation of section 242 of the German Code. Similarly section 1036 is a translation of section 932 of the German Code. The basic idea may be related to the principle "*en fait de meubles possession vaut titre*," but the details and the wording are borrowed from the German Code.

In my submission there is nothing wrong in that. The Greek legislator was wise in seeking for a model, fortunate in finding an excellent one and very successful in not only copying, but also in improving upon the one that he had chosen.

E. J. Cohn